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No.

In the Supreme Court of the United States

October Term, 1984

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the lawfulness of an employer's interrogation of an employee is to be determined by application of a *per se* rule (as was done in the instant case) or by a consideration of the facts and circumstances of the particular case.

2. Whether a court of appeals, upon review of an order of an administrative agency, should remand the matter for further consideration when the agency has subsequently overruled the law and policy on which its prior order was based.

3. Whether in view of the rights of employees to choose their collective bargaining agents in a fair and informed election, the National Labor Relations Board should set aside representation elections for last minute campaign materials that contain material misrepresentations of fact or are so deceptively presented as to constitute forgeries.

4. Whether an employer's post-certification letter informing employees of the employer's intention to test union certification through a technical refusal to bargain is protected by the First Amendment to the Constitution of the United States and by Section 8(c) of the National Labor Relations Act.

PARTIES AND RULE 28.1 STATEMENT

This petition is filed on behalf of Van Dorn Plastic Machinery Company ("Van Dorn" or "the Company"), a division of Van Dorn Company.* Respondent is the National Labor Relations Board ("the Board"). While it was not a party to the proceedings in the Court of Appeals, the International Association of Machinists and Aerospace Workers, District 54 was a party to the proceedings before the National Labor Relations Board, and thus has an interest in the present proceedings.

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*Other divisions of Van Dorn Company are Central States Can Co., Davies Can Co., George A. Milton Can Co., and Trubor Co. Van Dorn is also a co-owner of Reifenhauser-Van Dorn Co., a joint venture.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Van Dorn Plastic Machinery Company, Petitioner herein, respectfully petitions for certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and initial judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 6, 1984, is unreported and is reprinted at A1 of the Appendix to this petition. The order of the Court of Appeals, entered on July 23, 1984, vacating its judgment of June 6, is unreported and is reprinted at A41 of the Appendix. The judgment of the Court of Appeals, entered on July 23, 1984, is unreported and is reprinted at A42 of the Appendix. The decision and order of the National Labor Relations

Board, entered on December 14, 1982, is reported at 265 N.L.R.B. 864 (1982) and is reprinted at A18 of the Appendix. The order of the National Labor Relations Board remanding the case to the administrative law judge, entered on November 12, 1980, is reported at 253 N.L.R.B. 268 (1980) and is reprinted at A32 of the Appendix. The decision and certification of representative of the National Labor Relations Board, entered on January 17, 1978, is unreported and is reprinted at A39 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 23, 1984. A timely petition for rehearing was denied on July 17, 1984, and the court's order is reprinted at A48 of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §2350.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides as follows:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

This action also involves several provisions of Section 158 of the National Labor Relations Act of 1947, as amended, 29 U.S.C. §158 ("the Act"), which provide in pertinent part as follows:

Section 158. UNFAIR LABOR PRACTICES

(a) Unfair Labor Practices By Employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159(a) of this title.

* * * * *

(c) Expression Of Views Without Threat Of Reprisal Or Force

The expressing of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit enforcing in part the decision and order of the National Labor Relations Board, finding violations by Van Dorn of the National Labor Relations Act of 1947, as amended, 29 U.S.C. §151 et seq. Van Dorn seeks review of the following determinations by the Court of Appeals:

(1) That Van Dorn violated §8(a)(1) of the Act by informing employees in a post-certification letter that it would refrain from bargaining with the Union until its challenge of the Union's certification was resolved in the courts.

(2) That a Van Dorn Vice-President unlawfully interrogated, restrained and coerced a Union adherent in violation of §8(a)(1) of the Act.

(3) That a Union flyer interjected into the representation campaign at a time when the Company was unable to respond to it was neither a forgery nor a material misrepresentation of issues of extreme importance to the employees, and therefore did not justify the holding of a new election.

STATEMENT OF FACTS

On March 3, 1977, the Union filed a petition with the Board seeking to represent all production and maintenance employees of Van Dorn, a northeast Ohio employer, for purposes of collective bargaining. A representation election was held on April 22, 1977, which resulted in a slim majority of the votes being cast in favor of representation by the Union. Van Dorn filed objections to the conduct of the election, and to the conduct of the Union which affected the results of the election. One of the objections concerned the distribution by the Union, on the eve of the election, of a document purporting to be a copy of portions of one of its contracts (the "Nelson Flyer"). App. at 49.*

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*Refers to pages of the Appendix. *Note*: In light of the restrictions imposed by Rule 33(c) of the Supreme Court Rules, a copy of the Nelson Flyer has been lodged with the Clerk of this Court.

The document was a forgery: the collage of photocopied items, all of which appeared to be from a contract between the Union and Nelson Stud Welding Company, a large employer located near Van Dorn's plant, was in fact composed of excerpts from a contract negotiated in California by another district union with an employer whose name was identical but who had only four employees. The Union carried its deception one step further by including in the collage a set of wage rates that was not in fact photocopied from the California contract, but was made up by the Cleveland union organizer. The Union deliberately hid from Van Dorn's employees the location of the listed plant, and the identity of the signatory union. The Board's Regional Director conducted a limited investigation and, while he found that the Nelson Flyer was a material misrepresentation, he nevertheless, without a hearing, recommended overruling all of Van Dorn's objections. Van Dorn's exceptions to the Regional Director's decision were overruled and the Union certified on January 17, 1978. App. at A39.

Commencing on February 22, 1978, the Union requested to bargain with Van Dorn. Van Dorn, intending to pursue its election objections and to test the certification of the Union, engaged in a technical refusal to bargain and so informed the Union. The Union considered resorting to a strike in an attempt to force Van Dorn to bargain. It held two strike votes, the first on April 2, 1978, and the second on May 7, 1978, both of which it publicized in advance.

Before the strike votes, William Sheffield, Van Dorn's Vice-President of Operations, who frequently conversed with employees at their work stations, had a variety of conversations with Thomas Vale, a designated Union representative. Two such conversations form the basis for the

Board's later charge of unlawful interrogation. The first conversation took place before the April 2 vote. Mr. Sheffield approached Vale and asked whether the Union was taking a strike vote that weekend. After Vale responded affirmatively, Mr. Sheffield told him that the employees did not need to go on strike and should allow the courts to resolve the matter. Sheffield never asked Vale how he or any other employee was going to vote.

The second conversation occurred after the Union announced its intention to take a second strike vote, but before the vote was held. At that time, Mr. Sheffield again discussed with Vale the possibility that the employees would vote for a strike and asked whether the employees would report to work on the following Monday. Vale said he hoped the employees would vote to strike. The two then joked about the possibility of the pickets using the Company's scrap wood for a fire on the picket line. Again, Sheffield did not ask how Vale or any other employee was going to vote. Vale admitted that he never felt in any way threatened in his conversations with Mr. Sheffield.

Prior to the May 8 strike vote, Van Dorn distributed a letter to the employees (the "Smith Letter"), App. at A59. The Smith letter informed employees that Van Dorn would refrain from bargaining with the Union until the courts had resolved whether the election was fair. The letter on its face was designed to respond to incorrect statements of the Union claiming that Van Dorn had stated that it would never bargain with the Union. Smith's response formed the basis for the Board's finding of a violation of §8(a)(1).

RULINGS BELOW

The Board's decision in December 1982, marked the end of a 5 1/2 year odyssey during which time the Board changed its mind on a fundamental policy question no less than three times. In addition, long administrative delays were encountered, exacerbating an already volatile workplace situation.

On April 28, 1977, Van Dorn filed formal objections to the representation election. After an informal investigation without hearing, the Regional Director of the Board issued a report recommending that Van Dorn's objections be overruled and the Union certified. The Regional Director determined that the Nelson Flyer did not rise to the level of a forgery under *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), a case decided after the petition was filed but before the election. Under *Shopping Kart*, which overruled *Hollywood Ceramics Company, Inc.*, 140 N.L.R.B. 221 (1962), campaign misrepresentation, absent forgery, is not sufficient alone to set aside a representation election. The Board subsequently certified the results of the election on January 17, 1978.

When Van Dorn chose to test the Union's certification through a technical refusal to bargain, the Board issued a series of complaints alleging that Van Dorn unlawfully refused to bargain with the Union in violation of §8(a)(5) of the Act, and that the Smith Letter and the Sheffield conversations constituted violations of §8(a)(1) of the Act. Hearings on the complaints were held in Cleveland, Ohio on October 24 and 25, and on December 6, 1978, before an administrative law judge. Over a year later (during which time the Board abandoned the *Shopping Kart* standard), on March 31, 1980, the law judge issued

a decision and recommended order (Supp. App. at S1-S84)* finding, in pertinent part, that the Sheffield conversations did constitute a violation of the Act. However, the law judge also found, in light of the newly-applicable Board standard as announced in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), that the Nelson Flyer contained substantial misrepresentations sufficient to invalidate the representation election. *General Knit* overruled *Shopping Kart* and reinstituted the *Hollywood Ceramics* standard for evaluating campaign misstatements, allowing the Board to void an election on the basis of either a material misrepresentation or a forgery. The law judge therefore found no violation in Van Dorn's announced intention in the Smith letter not to bargain with the Union pending its challenge to certification, since the refusal was justified by the Board's *General Knit* standard.

The Board declined to review the law judge's recommendations on their merits; instead, on November 12, 1980, it remanded the case to the law judge for further evidentiary hearings in light of *General Knit* on Van Dorn's objection to the Nelson Flyer and, derivatively, the certification of the Union (App. at A32). After a second set of hearings on January 21 and 22, 1981, the law judge issued a supplemental decision (Supp. App. at S85) which found that Van Dorn's objection was without merit and that consequently, Van Dorn's refusal to bargain was a violation of §8(a)(5) of the Act. The law judge also reversed his previous decision with respect to the Smith letter, finding it to be a violation of §8(a)(1) of the Act.

Prior to rendering its decision in the present case, the Board overruled *General Knit*. *See, Midland National Life Insurance Company*, 263 N.L.R.B. 127 (1982). As a result

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*Refers to pages of the Supplemental Appendix.

of its readoption of the *Shopping Kart* standard, the Board affirmed the law judge's supplemental recommendations regarding Van Dorn's objections to the Nelson Flyer without formally analyzing his decision under the *Hollywood Ceramics/General Knit* standard. The Board also affirmed other findings of the law judge concerning Van Dorn's refusal to bargain, the Smith letter, and the Sheffield conversation. The Board overruled other portions of the law judge's decision not relevant to this petition. *See,* App. at A18. Accordingly, the Board ordered Van Dorn, *inter alia,* to recognize and bargain with the Union, to cease interrogating employees concerning strike votes and urging employees not to support a strike, and to refrain from telling employees that Van Dorn would not bargain with the Union until the courts determined whether the election was fair. It was this order that was reviewed by the Court of Appeals.

The largest part of the court's opinion (App. at A1) addressed the issue of the proper standard for determining whether campaign misrepresentations are sufficiently deceptive to set aside an election. The court traced the evolution of the Board's standard of evaluation, remarking that, "incredibly", the Board has employed four standards in the last seven years, reversing itself three times during the pendency of the present case. The court chose, however, to apply the *Midland* standard. The court found that while the Nelson Flyer contained misrepresentations, the flyer was not a forgery. Therefore, measured by the "new" standard, the misrepresentations alone were insufficient to set aside the election.

The court expressed some reluctance, however, to be bound by the *Midland National Life* rule in every case. It noted that the election may be invalidated even when "no forgery can be proved but where the misrepresentation

is so pervasive and the deception so artful that the employees will be unable to separate truth from untruth and where the rights to a free and fair choice would be affected" (App. at A9). Nonetheless, the court held that the Board did not abuse its discretion in rejecting Van Dorn's objections. The court also accepted the Board's findings regarding the Sheffield conversations and the Smith Letter as based on substantial evidence, but added no further comment. Circuit Judge Contie, in a separate concurrence and dissent, dissented from the court's findings regarding the Sheffield conversations (App. at A15-A16).

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions with respect to the proper standards to be applied by the Board in its administration of the National Labor Relations Act. The parameters of free speech in an employer's communication with employees outside the context of a representation election campaign have never been considered by this Court. The Sixth Circuit's decision concerning the Smith letter and the Sheffield conversations is in conflict not only with the opinions of other circuits, but also with its own decisions and with a recently-decided Board case which rejected the standard used by the court.

Furthermore, the Sixth Circuit's failure either to remand the case to the Board or to apply the Board's new standard conflicts with a previous decision of this Court and the decisions of several other circuit courts.

Also presented for review by this case is the standard to be applied by the Board in judging the propriety of pre-election campaign statements. This issue too is a matter of first impression for this Court. Since 1977, the

Board has reversed itself no less than three times concerning the applicable standard. The First and Sixth Circuits have expressed doubts over the Board's most recent pronouncement in *Midland National Life Insurance.* In light of the Board's apparent inability to formulate a workable standard by which to gauge campaign propaganda, this is an appropriate case for review.

Certiorari Should Be Granted to Resolve Conflicts Among the Lower Courts in Assessing the Lawfulness of Employer Interrogations of Employees.

The Court of Appeals affirmed the Board's finding that the Sheffield conversations were in violation of Section 8(a)(1) of the Act. The Board's finding resulted from its application of a *per se* rule of interpretation of employer-employee communications, which held that questions concerning union activities are deemed inherently coercive of employees' rights protected under §7 of the Act in any circumstances and regardless of the subjective impression of the employee. *See, PPG Industries,* 251 NLRB 1146 (1980). This case and the standard it endorsed was expressly overruled in the Board's recent decision in *Rossmore House,* 269 N.L.R.B. No. 198, 116 L.R.R.M. 1025, 1027 (April 25, 1984).

In *Rossmore House,* the Board returned to the case by case approach in determining the coerciveness of employer interrogation set forth in *Blue Flash Express,* 109 N.L.R.B. 591 (1954), which had been the recognized standard for nearly 25 years prior to the Board's *PPG Industries* decision:

> We will no longer apply the *PPG* standard. We conclude that *PPG* improperly established a per se rule that completely disregarded the circumstances sur-

> rounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago [citing *Blue Flash Express*] when it set forth the basic test for evaluating whether interrogations violate the Act; whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. . . *Rossmore House*, 116 LRRM at 1026.

Prior to the Board's decision in *Rossmore House*, several circuits, including the Sixth Circuit, had rejected the *per se* rule in favor of the *Blue Flash Express* case-by-case approach. Thus in applying the *per se* rule to the Sheffield conversations, the Sixth Circuit is in direct conflict with its own precedent as well as that of several other circuits. In *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the Second Circuit established a test which has also been employed by the Sixth Circuit. *Jervis Corporation, Bolivar Div. v. NLRB*, 387 F.2d 107 (6th Cir. 1967). *See also, NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236 (6th Cir. 1983); *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355 (6th Cir. 1972); and *Hughes & Hatcher, Inc. v. NLRB*, 393 F.2d 557 (6th Cir. 1968).[1]

The Third Circuit has recently called the *per se* analysis unrealistic.

> . . . To hold any instance of casual questioning concerning union sympathies violates the Act, ignores the

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1. *Bourne's* approach takes into account the history of labor relations at the employer's plant, the authority of the questioner, the formality of the interrogation, the character of the information sought and the employee's truthfulness in reply. *Bourne*, 332 F.2d at 48. The *Bourne* analysis was cited with approval by the Board when it abandoned the *per se* rule. *Rossmore House*, 116 L.R.R.M. at 1027 n.20.

> realities of the work place . . . What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize. *Graham Architectural Products Corporation v. NLRB*, 697 F.2d 534, 541 (3rd Cir. 1983).

The *per se* rule has also been rejected in the Fifth Circuit, *Mosher Steel Company*, 220 N.L.R.B. 336 (1975), *enforced*, 532 F.2d 1374 (5th Cir. 1976) (there is no *per se* violation where the employer asks the employee if he intends to go on strike); and the Seventh Circuit, *e.g.*, *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980) ("it is well established that interrogation of employees is not illegal *per se*").

Evaluated by the rules of the Second, Third, Fifth and Seventh Circuits, the Sheffield conversations fall well outside the scope of harm from which the Act seeks to protect employees. As demonstrated above, this Court of Appeals too has rejected the *per se* rule in a series of cases. In fact, in an opinion rendered three weeks after the decision in the present case, the Sixth Circuit again disavowed the application of the *per se* rule to employer interrogations of employees! *See*, *NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984).

The employee, Vale, perceived no threat or coercion in Sheffield's inquiries. *See*, excerpt from Hearing Transcript (App. at A61). In fact, the subject conversations occurred in a place and manner familiar to both men from routine workday relations. Under the rule applied by the court below, however, the Sheffield conversations are unlawful solely by definition. The conflict of standards adopted by the circuits, as well as the inconsistency of application by the Sixth Circuit, will lead to profoundly inconsistent applications of the Act, even inconsistent

adjudications of identical claims against a single employer doing business in several jurisdictions. Until this Court makes a definitive interpretation of §8(a)(1) with regard to employer-employee communications, employers will remain at a loss for guidelines to govern their conduct.

Certiorari Should Be Granted to Correct the Error of the Court of Appeals in Affirming a Board Decision Predicated on Policy Repudiated by the Board Prior to the Court's Review.

The Board's finding that Van Dorn engaged in unlawful interrogation of its employees was governed by the standard articulated in *PPG Industries*. This *per se* rule was expressly overruled by the Board in *Rossmore House* on April 25, 1984, after argument and submission of the present case to the Court of Appeals. In its Petition for Rehearing, Van Dorn alerted the court to the Board's *Rossmore House* decision, but the court declined to review or remand the issue in its Denial of Rehearing (App. at A48). It is the contention of Petitioner that in light of the complete reversal of Board policy in the administration of the Act, the Sixth Circuit was required in adherence to prior precedent of this Court to remand that issue to the Board for reconsideration in light of the newly-promulgated standard.

In *NLRB v. Food Store Employees Local 347*, 417 U.S. 1 (1974), this Court approved a lower court's remand of a Board decision to allow the Board to determine whether an intervening policy modification should be applied retroactively to the case. The court noted that:

> Appellate courts ordinarily apply the law in effect at the time of the appellate decision. However, a court reviewing an agency decision following an intervening

> change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act. 417 U.S. at 10 n.10. (citation omitted).

This rule has been followed in several circuits. *See, e.g., Certainteed Corporation v. NLRB*, 714 F.2d 1042, 1056 (11th Cir. 1983); *Cedar Coal Company v. NLRB*, 678 F.2d 1197, 1199 (4th Cir. 1982) and *NLRB v. Cambridge Wire Cloth Co., Inc.*, 622 F.2d 1195, 1200 (4th Cir. 1980); and *Central Power and Light Company v. United States*, 639 F.2d 1104, 1106 (5th Cir. 1981).

Rossmore House represents a material change in Board policy with regard to the issue of employer interrogation in this case. The Sheffield conversations cannot reasonably be held "coercive" under the facts and circumstances test of *Rossmore House*, in light of the non-coercive context of the conversations and the testimony of Vale. The failure of the Court of Appeals to apply the current Board standard, or in the alternative, to remand the case for the Board's reconsideration, denies Van Dorn the benefit of the application of the new Board rule to the unique facts of this case, is contrary to this Court's holding in *Food Store Employees Local 347*, and frustrates the Board's broad Congressional mandate to fashion remedies that will effectuate the purposes of the Act. *See, e.g., Shepard v. NLRB*, 459 U.S. 344 (1983).

Certiorari Should Be Granted to Redress the Board's Inability to Promulgate a Standard by Which to Judge Pre-Election Propaganda.

This Court has declared that it is the duty of the Board to establish procedures and safeguards necessary to

insure the fair and free choice of bargaining representatives. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). It has gone so far as to grant the Board wide discretion to ensure that free and fair choice [*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969)], so long as the Board's action demonstrates a "consistent and contemporaneous construction" of the Act, *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973). Where the Board has failed in that essential purpose, this Court has not hesitated to strike down standards incompatible with the spirit and meaning of the Act. *See, NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 276-77 (1973).

In the present case, the Board has shown itself to be totally incapable of fashioning a consistent and enduring standard by which to judge pre-election campaign statements of employers and unions. By changing its mind three times in the past seven years in this critical area of employer-employee relations without engaging in any rule-making procedure, the Board has displayed a cavalier attitude in its administration of the Act's promise of a free and fair election. Literally thousands of representation elections each year are conducted by the Board and thus subjected to its seemingly endless vacillation on this issue. As this case raises an important question of first impression in the administration of the Act, Van Dorn contends that certiorari should be granted. *Musicians Federation v. Wittstein*, 379 U.S. 171, 175 (1964).

The Board's first attempt to evaluate the truth and falsity of campaign propaganda occurred in *The Gummed Products Co.*, 112 N.L.R.B. 1092 (1955), in which it set aside an election where the union deliberately misstated wage rates it had negotiated with the employer's competitors. Seven years later, the Board further defined the

limits of campaign misrepresentations in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), by resolving to set aside an election where the prevailing party's misrepresentation, whether deliberate or not, involved a substantial departure from the truth or similar "campaign trickery", and was made at a time when the other party could not make an effective reply. 140 N.L.R.B. at 224.

Less than a month prior to the election in controversy in the present matter, the Board announced a dramatic change in policy. In *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), the Board declared that an election would be set aside only where a party had used forged documents or had physically altered an official Board document in such a manner as to suggest that the Board favored one of the parties and not where a party had made misleading campaign statements. Less than eighteen months later, the Board again reversed itself, reinstating its *Hollywood Ceramics* doctrine, in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). Three and one-half years later, *General Knit* was itself overruled as the Board decided to resurrect its prior *Shopping Kart* decision in *Midland National Life Insurance Company*, 263 N.L.R.B. 127 (1982).

While purporting to apply the *Midland National Life* rule to the facts in the present case, the Sixth Circuit disavowed any intention to be bound by that rule in future cases:

> Though we have no hesitation in upholding the Board's decision on the issue of misrepresentation in the present case we do share the First Circuit's reluctance to be bound by the *Midland National Life* rule in every case. There may be cases where no forgery can be proved, but where the misrepresentation

> is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. *Midland National Life* at 131 . . . App. at A9.

In a similar manner, the First Circuit expressed approval of *Midland National Life* as applied to the facts presented in *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983). That court also indicated that a broader rule more closely resembling the *Hollywood Ceramics* doctrine might be applied in future cases.

> . . . In so holding, however, we do not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations. The Board has a duty to provide reasonably for the employees' "unhampered freedom of choice". *International Association of Machinists Lodge No. 35*, 311 U.S. at 80, 61 S.Ct. at 88. Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under *Midland*, upon certifying the results of the fraudulent election might constitute legal error. 720 F.2d at 729.

Thus, two circuit courts have expressed dissatisfaction over the narrowness of the *Midland National Life* doctrine and have indicated that they will not necessarily defer to the Board's use of that standard in every case. On the other hand, several other circuit courts in upholding the *Midland*

National Life rule have done so without qualification except as to its retroactive application.[2]

The Board's inability to fashion a workable standard in the area of permissible election campaign conduct and to adhere to that standard has led to a predictable result: the prospect of differing standards being applied by the circuit courts in similar cases, as well as speculation that changes in Board personnel may result in yet another change in the standard. It will also inevitably have a profound effect in the labor-management arena where unpredictability of this sort will only encourage the adversaries to engage in the basest kind of campaign propaganda. While the Board has clearly abnegated its responsibility to articulate a uniform and consistent policy, this Court should not do so.[3]

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2. Second Circuit: *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2nd Cir. 1983).

Fourth Circuit: *National Posters, Inc. v. NLRB*, 720 F.2d 1358, 1363-64 (4th Cir. 1983).

Fifth Circuit: *NLRB v. Rolligon Corp.*, 702 F.2d 589, 594-95 (5th Cir. 1983).

Seventh Circuit: *NLRB v. Milwaukee Brush Mfg. Co.*, 705 F.2d 257, 258 (7th Cir. 1983).

Eighth Circuit: *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983).

Ninth Circuit: *NLRB v. Yellow Transportation Company*, 709 F.2d 1342, 1343 (9th Cir. 1983).

Eleventh Circuit: *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1052-60 (11th Cir. 1983).

3. Van Dorn would argue that the proper standard to be applied in the present case is set forth in the Sixth Circuit's opinion in *Cascade Corporation v. NLRB*, 466 F.2d 748, 753-54 (6th Cir. 1972)—a standard which the Sixth Circuit inexplicably ignored in the present case. Under *Cascade*, an election shall be set aside where a party's campaign propaganda is found to constitute either a forgery or a material misrepresentation of fact such as to have an impact upon the election. The Nelson Flyer clearly falls within the *Cascade* definition of forgery, to wit:

(Continued on following page)

The Board has clearly shown itself to be undeserving of the deference usually shown by the courts to its policy standards. Under the standards set forth by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), inconsistent and contradictory pronouncements by an administrative agency are accorded little consideration. *See also, General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). The Board's continuing vacillation (committed in the context of adjudication, rather than rulemaking) in a critical area of labor-management relations does not promote the tranquility and stability in labor relations envisioned by the framers of the National Labor Relations Act.

The Decision of the Board and Lower Court Violates the Employer's Right of Free Speech.

In a letter addressed to employees of Van Dorn, Company President Sam Smith candidly stated the intention of Van Dorn to challenge the Union's certification in federal court. App. at A59. Both the Board and the court below held the letter to be a violation of §8(a)(1) of the Act. It is the contention of Van Dorn that both the Board and the court failed to consider the free speech protections guaranteed to the employer by the First Amendment to the United States Constitution and by §8(c) of the Act.

This Court has previously held that the employer's "free speech right to communicate his views to his employees is firmly established and cannot be infringed by

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Footnote continued—

> "[t]he fabrication or counterfeiting of evidence. The artful and fraudulent manipulation of physical objects, or the deceitful arrangement of genuine facts or things, in such a manner as to create an erroneous impression or a false inference in the minds of those who may observe them."

466 F.2d at 752.

a union or the Board". *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969). Section 8(c) of the Act merely seeks to implement the First Amendment protections of free speech by acknowledging the right of the employer to express an opinion so long as it does not contain a "threat of reprisal or force or promise of benefit" in violation of §8(a)(1). *Id.* The permissible scope of the employer's expression, therefore, must be analyzed within the "context of its labor relations setting" and necessarily requires a balancing of the employer's free speech rights with the employee's rights to associate without fear of employer retaliation or coercion. *Id.*

The Board clearly did not employ such a balancing test in the present case. It adopted a finding that since the employer's technical refusal to bargain was not justified, its communication to employees that it had resolved to pursue that course of action was itself a violation of the Act. Supp. App. at S164. Such tortured logic emasculates the free speech protections of §8(c) depriving the employer of those protections should his technical refusal to bargain subsequently be rejected by the Board. The employer's entitlement to the protections of §8(c) should not be made to hang from so thin a thread.

This Court has acknowledged that the employer's only means of challenging the Board's certification of a union is by engaging in a technical refusal to bargain. *See, Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). Van Dorn's letter merely stated its intention to pursue the only legal alternative open to it to test the Union's certification. Circuit courts, including the Sixth Circuit, have held that an employer may inform employees of their fundamental rights under the Act. *See, e.g., Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815, 820 (6th Cir. 1983)

(Employee letter advised employees of right to resign from union and to revoke dues checkoff authorizations); *Florida Steel Corporation v. NLRB*, 587 F.2d 735, 750-53 (5th Cir. 1979) (Employer letter informed employee of right to have attorney present before making statements to Board agents).

The letter in the instant case contained no threat of reprisal or force and did not promise employees any benefit. In fact, neither the Board nor the court made any specific finding in this regard—a finding which is essential to overcoming the protections of §8(c). Van Dorn merely announced its intention to exercise its fundamental right to seek review of the Union's certification in the courts. If the letter is read in the context of the immediate situation, it is clear that Van Dorn was merely correcting misinformation given to its employees by the Union. Such an expression is clearly protected speech under §8(c) and does not constitute a violation of §8(a)(1). In fact, it does not even rise to the level of an employer's announced resolve to use every lawful means to avoid unionization—a statement deemed proper under the Act. *See, L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1347 (9th Cir. 1980).

The Board and the court below have clearly ignored this Court's admonitions in *Gissel Packing* by failing to balance the employer's free speech rights with the protected rights of the employees. Every employer has the right protected by §8(c) of the Act to explain to its employees the reasons for its decision to engage in a technical refusal to bargain and the consequences thereof. Unless this Court acts to rectify the Board's deprivation of Van Dorn's rights of free speech, employers will be frustrated in their attempts to communicate with employees once a

technical refusal to bargain is pursued by the employer.[4] To paraphrase this Court's holding in *Gissel Packing*, neither the union, the Board, nor the courts may abridge that right.

It is ironic that at the very moment the Board chooses to give First Amendment rights free reign through the readoption of its "laissez-faire" approach with respect to representation election campaigns, it also deprives the employer of its First Amendment rights to communicate with its employees in the post-election context. The Board's decision concerning the Smith letter operates as nothing less than an administratively imposed "gag rule" upon Van Dorn's rights of free speech. This Court recently noted that restrictions on the free exchange of views and ideas must be "demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing the protected expression". *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982). Indeed the preferred First Amendment remedy is "more speech, not enforced silence". 456 U.S. at 61.[5]

The Board has shown no compelling interest justifying restrictions on Van Dorn's constitutionally protected right to engage in the free exchange of ideas with its employees.

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4. This is not an insignificant concern—for the Board's order in this case prohibits Van Dorn from urging its employees not to strike and from explaining the basis for its technical refusal to bargain. Such a "gag" order simply cannot withstand First Amendment scrutiny.

5. Van Dorn's argument applies with equal force to the Sheffield conversations discussed above. The Board's recent decision in *Rossmore House* in fact acknowledges the strong First Amendment interest in protecting employer communications with employees, citing this Court's decision in *Gissel Packing*. *See*, 116 L.R.R.M. at 1026-27.

Its myopic view of employer communications with employees is clearly antithetical to this Court's expansive reading of the First Amendment's protections. The Board offers no justification for its unprecedented abridgement of Van Dorn's right of free speech—and indeed can offer none. Its response to Van Dorn's attempt to correct the Union's factual misstatement of the Company's position was to stifle Van Dorn's right of free speech. This Court's First Amendment precedents clearly do not adopt such a view. This Court has clearly struck the balance in favor of "more speech, not enforced silence". This principle must be applied in the present case.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: October 18, 1984

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 8, 1984)

No. 83-5012
No. 83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION to Review and Cross Application to Enforce a Decision and Order of the National Labor Relations Board.

Before: LIVELY, *Chief Judge;* JONES and CONTIE, *Circuit Judges.*

LIVELY, *Chief Judge,* delivered the opinion of the Court in which JONES, *Circuit Judge,* joins. CONTIE, *Circuit Judge,* (pp. 14-16) delivered a separate opinion concurring in part and dissenting in part.

LIVELY, *Chief Judge.* The most important issue in this labor case relates to the proper standard for determining whether communications from a union or an employer near the time of a representation election are sufficiently deceptive to require setting the election aside. After much

vacillation the National Labor Relations Board (the Board) appears to have settled on a standard, stated in *Midland National Life Insurance Co.*, 263 NLRB No. 24 (1982), as follows:

> In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart*, we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

I.

Van Dorn Plastic Machinery Company (Van Dorn) refused to bargain with District 54 of the International Association of Machinists and Aerospace Workers (the Union) following a Board-conducted election at which 151 employees at its Strongsville, Ohio, plant voted for the Union and 131 voted against it. In timely objections to the election Van Dorn charged several irregularities, including the allegation that the Union had distributed a flyer on election day which, while purporting to show that employees of another company had received favorable wage rates and benefits from a Union-negotiated contract, was in fact a forgery.

The Board's regional director conducted an investigation, without a hearing, and issued a recommendation that

all of the objections be overruled. The Board adopted the regional director's findings and recommendation and certified the Union as the exclusive bargaining representative of Van Dorn's production and maintenance employees. The decision which finally brought the dispute to this court resulted from an amended complaint which consolidated several unfair labor practice charges which the Union filed in the wake of the election. In addition to charging Van Dorn with refusal to bargain with the certified representative of its employees, the Union charged the employer with unfair labor practices consisting of unilaterally changing its paid lunch period policy and unilaterally implementing a new attendance control policy, both without prior bargaining with the Union, and unlawfully interrogating and coercing employees.

Two hearings on the charges were held before an administrative law judge (ALJ), the second pursuant to a remand by the Board. Following the second hearing the ALJ issued a decision recommending a finding that the Union had misrepresented the actual negotiated wage rates in the flyer, but that the misrepresentation was not so substantial as to have significantly affected the election results. The ALJ thus determined that the certification was valid and that Van Dorn had violated section 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (5) (1976) by refusing to bargain with the Union. The ALJ also found that Van Dorn had interrogated and coerced employees in violation of section 8(a)(1), but that it had not violated section 8(a)(5) by implementing an attendance control policy and changing its paid lunch policy without prior bargaining. However, the ALJ did find that Van Dorn had violated section 8(a)(5) by not bargaining about the effects of the change in lunch policy.

II.

A.

In *Midland National Life*, the Board traced the history of its treatment of campaign propaganda. In the early years under the Wagner Act the Board disregarded issues of truth or falsity of campaign propaganda, assuming that employees would recognize propaganda for what it was, and discount it. *Midland National Life* at 129. Following passage of the Taft-Hartley Act the Board shifted its stand and set aside elections where it found that employees were deceived by trickery or fraud as to the source of campaign propaganda and were unable to recognize or evaluate propaganda. See *United Aircraft Corporation*, 103 NLRB 102 (1953). Another change in the Board's treatment of campaign propaganda occurred in *Hollywood Ceramics Company*, 140 NLRB 221 (1962). There the rule was announced that an election would be set aside "where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Id.* at 224.

Fifteen years later the Board overruled *Hollywood Ceramics*, stating in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), that it would "no longer probe into the truth or falsity of the parties' campaign statements" but would intervene "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." *Id.* at 1311, 1313. Incredibly, the Board overturned *Shopping Kart* and reinstated the

Hollywood Ceramics standard less than two years later in *General Knit of California, Inc.*, 239 NLRB 619 (1978), and then reversed itself again in *Midland National Life*, returning to the rule of *Shopping Kart*. When the first hearing before the ALJ in the present case took place the *Shopping Kart* standard prevailed. On the last day of that hearing the *General Knit* decision was issued. By the time this case reached the Board for its final decision, *General Knit* had been discarded in favor of a return to the *Shopping Kart* standard in *Midland National Life*.

B.

Applying its recently announced *Midland National Life* rule, the Board held that the election day flyer was not a forgery and, without analyzing the truth or falsity of the statements which it contained, determined that "the Union's campaign material involved here was not objectionable. . . ." The Board thus upheld the finding of the ALJ that Van Dorn violated section 8(a)(5) by its refusal to bargain with the Union. The Board also upheld the findings of the ALJ that Van Dorn violated section 8(a)(1) by interrogating and coercing employees and by refusing to bargain with the Union on the effects of its unilateral change in the paid lunch policy. However, the Board disagreed with the ALJ in two respects. It found the unilateral change in Van Dorn's paid lunch policy during the pendency of its exceptions to the regional director's findings on its objections to the election to be a violation of section 8(a)(5) and (1). The Board also found the announcement of a change in Van Dorn's attendance control system in June 1978 a violation of section 8(a)(5) and (1). Van Dorn was ordered to cease its unfair labor practices, to recognize, and upon request, meet and bargain with the Union and to post a notice to its employees. The

decision and order of the Board appear at 265 NLRB No. 36 (1982). Van Dorn filed a petition to review the decision and order, and the Board filed a cross-application for enforcement.

III.

A.

We agree with the ALJ that the flyer which was distributed by the Union shortly before the election contains misrepresentations concerning wage rates and, possibly, the identity of the union involved with the other employer. However, it is not a forgery. It is a memorandum to Van Dorn employees on IAM District Lodge 54 letterhead which purports to answer representations made in a pamphlet previously distributed by Van Dorn. An attached sheet lists job classifications and wage rates along with several excerpts from a collective bargaining agreement.

Van Dorn argues that the page of excerpts is a forged document because it is not clear what is real and what is fabricated. It also argues that it is a forgery because the Union intentionally blocked out the identity of the contracting local to give the impression that the agreement involved a near-by plant. In fact, the wage rates listed were those of a plant in California and were a compilation of base rates and premiums. As presented, the listed rates overstated the actual wages being paid. Anyone who examined the document would consider the list as having been taken from the collective bargaining agreement. Nevertheless, it was not a forgery merely because the rates presented were a compilation of the negotiated base rates and premiums. There was no claim by the Union that the listing was complete or that it was anything more than an example of the rates in one of IAM's contracts.

Nor was it a forgery merely because the identity of the contracting local had been obscured. Measured by the *Midland National Life* standard, the Union flyer does not constitute a proper basis for setting aside the election.

B.

There remains the question of whether the *Midland National Life* standard should be adopted by this court. The Board enjoys a particularly broad discretion "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) (citations omitted). Our review of the Board's decision to narrow the instances in which an election will be set aside on the ground of campaign misrepresentations is limited to determining whether there has been an abuse of discretion. The test for determining whether the Board has abused its discretion is whether its orders have a "reasonable basis in law." Board orders have been held to have no reasonable basis in law, "either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

The purpose of any rule relating to representation elections is to insure that employees have an opportunity to make a free and fair choice, that their right under section 7 of the Act, 29 U.S.C. § 157 (1976), "to bargain collectively through representatives of their own choosing," is preserved. In *Midland National Life* the Board concluded that while the *Hollywood Ceramics* standard had been difficult to apply the *Shopping Kart* decision drew a clear line between permissible and objectionable propaganda and established a standard which "lends itself to definite results

which are both predictable and speedy." *Midland National Life* at 131. The Board felt that this rule greatly reduced the incentive for protracted litigation and the resulting uncertainty which surrounds a contested election. In addition, the Board found that a return to its earliest attitude toward campaign propaganda represented a better understanding of the ability of employees to recognize and deal with campaign propaganda realistically. *Id.* at 132.

In *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983), the court dealt with allegations of misrepresentations concerning potential benefits of unionization. Though it found the misrepresentations trivial, and not objectionable under the more lenient standard of *Hollywood Ceramics*, the court specifically accepted the Board's *Midland National Life* rule. In doing so it noted the wide discretion given to the Board by Congress and the reasons for returning to the *Shopping Kart* rule as stated in *Midland National Life*, and concluded:

> There was thus a "reasonable basis in law" for the Board's return to the *Shopping Kart* analysis, and we defer to that decision. *See NLRB v. Hendrick's County Rural Electric Corp.*, 454 U.S. 170, 176, 102 S.Ct. 216, 221, 70 L. Ed.2d 323 (1981).

721 F.2d at 892. The same approach was taken by the court in *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983), in electing to defer to the decision of the Board. The court in *NLRB v. Yellow Transportation Company*, 709 F.2d 1342 (9th Cir. 1983) (per curiam), applied *Midland National Life* without discussion.

Reacting somewhat differently, *in NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983), the court applied the *Midland National Life* rule but adopted the rule "only with respect to the situation arising in

the instant case." *Id.* at 728. In applying the rule the court concluded that the alleged misrepresentation "was scarcely likely to have affected the employees' free and fair choice." *Id.* at 729. In refusing to be bound by *Midland National Life* in all cases the court stated:

> Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under *Midland,* upon certifying the results of the fraudulent election might constitute legal error.

Id. Senior Judge Bailey Aldrich concurred specially, finding the *Midland National Life* rule "an abnegation of the Board's recognized duty to ensure a fair and free choice of bargaining." *Id.* at 730.

Though we have no hesitation in upholding the Board's decision on the issue of misrepresentation in the present case we do share the First Circuit's reluctance to be bound by the *Midland National Life* rule in every case. There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. *Midland National Life* at 131. Thus considered the Board did not abuse the "wide degree of discretion" granted by Congress in rejecting Van Dorn's objections to the election. See *NLRB v. Basic Wire Products, Inc.,* 516 F.2d 261 (6th Cir. 1975).

IV.

The Board disagreed with the ALJ's treatment of two of the unfair labor practices charges relating to unilateral changes in Van Dorn's paid lunch period and attendance control policies. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1976), requires collective bargaining "with respect to wages, hours, and other terms and conditions of employment." A unilateral change with respect to a mandatory bargaining subject is a violation of section 8(a)(5). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977).

A.

Prior to certification but after the election Van Dorn eliminated paid lunch periods for approximately 35 employees without offering to bargain on this issue with the Union. At the initial administrative hearing on the complaint, General Counsel for the Board and Van Dorn's counsel stipulated in writing that the change was made "due to business necessity." Van Dorn agrees that its paid lunch policy is "a condition of employment" and that it acted unilaterally. However, it takes the position that the stipulation brought it within a recognized exception to the bargaining requirement which permits unilateral changes based on "compelling economic considerations." See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974), *enf. denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). The ALJ construed the stipulated reason for the change in lunch policy—"business necessity"—as the equivalent of "compelling economic considerations." Thus, he excused Van Dorn from bargaining on the change, while requiring it to bargain on the effects of the change.

The Board found that the stipulation did not satisfy the "compelling economic considerations" exception. On appeal Van Dorn argues that the stipulation was binding, and giving the words their ordinary meaning, clearly brought its action within the exception. It is not clear from this record what the parties intended when they entered into the stipulation. However, a stipulation once entered into should be construed to give it legal effect. *National Audubon Society, Inc. v. Watt,* 678 F.2d 299, 307 (D.C. Cir. 1982). A remand is necessary to determine the correct interpretation of the stipulation. Van Dorn proceeded on the assumption that the stipulation relieved it of the duty to justify its failure to bargain on the change in lunch periods. The ALJ so construed the stipulation. If the stipulation is found to be ambiguous the Board must consider extrinsic evidence of the intention of the parties in entering into it. If the Board finds from such evidence that no agreement was actually reached and that the stipulation is a nullity, then fairness requires that Van Dorn be given an opportunity to establish "compelling economic considerations." In considering this question the Board would be required to categorize the lunch period action within the holding of *First National Maintenance Corp.,* 452 U.S. 666 (a decision which is "almost exclusively 'an aspect of the relationship' between employer and employee" must be bargained but a decision which only has an "indirect and attenuated impact on the relationship" or is made to preserve the business and involves a fundamental change in scope or direction need not be bargained). Regardless of the outcome of the remand, we affirm the Board's holding that Van Dorn is required to bargain with respect to the effects of the lunch period decision. *Id.* at 677-78 n. 15; see *NLRB v. Gray-Grimes Tool Co.,* 557 F.2d 1233 (6th Cir.), *cert. denied,* 435 U.S. 907 (1977).

B.

In June 1978 Van Dorn published a system for controlling employees attendance. It consisted of charging "points" for each absence or tardiness, with disciplinary action following the accumulation of seven points. When an employee complained that the policy had not been published previously, Van Dorn agreed to expunge all records of prior violations and announced that the policy would be effective July 1, 1978.

In his amended consolidated complaint the General Counsel alleged that Van Dorn violated section 8(a)(1) and (5) of the Act, "in or about June 1978" by unilaterally implementing a new attendance control policy. At the administrative hearing Van Dorn's director of employee relations testified that the point system announced in June had been in effect since January 1978. A point system had been maintained earlier, but the practice of recording absences and tardiness in effect at the time of the hearing had been implemented in January 1978. Upon inquiry by the ALJ, counsel for the General Counsel continued to maintain that the system had been implemented in June 1978 and that he was not seeking to amend the complaint. The ALJ found that the point system had been in effect for at least six months prior to June 1978 and that no issue had been presented of a unilateral act as of January. He specifically credited the testimony of the Van Dorn official and concluded that merely publicizing the pre-existing system did not constitute an unlawful unilateral change in the absence of an allegation or proof that Van Dorn had publicized the policy in an effort to undermine the Union. No such allegation or proof appears in the record.

The Board disagreed with the conclusion of the ALJ and found that the General Counsel had made a prima facie case of an unlawful unilateral change in working conditions and that Van Dorn had failed to refute the prima facie case. It is unclear whether the Board found that publication of the attendance policy in June constituted a change in June 1978 or whether it concluded that it was sufficient that some change had been made after the election, probably in January 1978. We can find no evidence that a change was made in the employee attendance control system in June 1978. A finding of such a change on this record would not be supported by substantial evidence. If the Board based its decision on this issue upon a finding that the attendance control system was changed sometime prior to June 1978, the decision cannot stand. We agree with Van Dorn's contention that the Board abused its discretion if it permitted a constructive amendment to the complaint, particularly after counsel had confirmed that he was charging a unilateral change in June 1978. Further, a change in January would have been more than six months prior to the filing of the charge and would be barred under section 10(b) of the Act, 29 U.S.C. § 160(b) (1976).

It appears that there are no circumstances which would take this charge outside the six-months limitation bar. We do not need to explore that possibility, however, because it is clear to this court that the General Counsel never charged Van Dorn with a violation at any time other than June 1978 and that the hearing was conducted on the basis of that charge. This issue is controlled by our recent decision in *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984). Reviewing a similar set of circumstances, we denied enforcement of one of the unfair labor practice charges, stating:

> The fundamental fairness inherent in administrative due process cannot permit the General Counsel to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed.

Id. at 544 (citations and footnote omitted). *Accord S.S. Kresge Company v. NLRB*, 416 F.2d 1225, 1234-35 (6th Cir. 1969).

V.

Van Dorn also asserts that the findings of violations of section 8(a)(1) in unlawful interrogation, restraint and coercion of employees are not supported by substantial evidence. We have examined the record with respect to these charges and conclude that the findings are supported by substantial evidence. Accordingly the Board's order will be enforced in this respect.

Other arguments by Van Dorn have been considered and found to be without merit.

CONCLUSION

Enforcement of the Board's order is denied insofar as it finds a violation of the Act consisting of a unilateral implementation of an attendance control policy. The Board's order is vacated insofar as it finds a violation of the Act in Van Dorn's implementation of a lunch period policy, and we remand for further proceedings. In all other respects the order of the Board is enforced. The Notice to Employees will be modified to reflect this court's decision. No costs are allowed in these proceedings.

CONTIE, Circuit Judge, concurring and dissenting. I fully agree with the majority's analysis of all issues presented in this case except one. Accordingly, I join in the majority opinion in every respect except for its determination of Part V that Van Dorn Vice-President William Sheffield, violated § 8(a)(1) by interrogating employee Thomas Vale. I conclude that Sheffield's conversation with Vale was not unlawful.

Strike votes were held by the Union on April 2, 1978 and May 7, 1978. Prior to each of these votes, Sheffield approached Vale at the latter's work station. Vale testified that Sheffield asked him on each occasion if he thought that the employees would vote in favor of a strike. Vale further testified that Sheffield stated that the employees did not need to strike and did not need a Union. Absent other evidence, these remarks would constitute substantial evidence of a § 8(a)(1) violation. Additional testimony of Vale, however, demonstrates that these conversations were not coercive.

One must begin with the proposition that, since an employer has the right to question employees in a non-coercive manner, *see NLRB v. Streamway Division*, 691 F.2d 288, 296 (6th Cir. 1982), an employer's questioning of an employee is not per se unlawful. *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 548 (6th Cir. 1984); *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 239 (6th Cir. 1983); *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355, 357 (6th Cir. 1972). Generally, "[i]n determining whether the . . . particular questioning . . . violates the Act we look to all the surrounding circumstances to determine whether it may reasonably be said that the interrogation 'tends to interfere with the free exercise of employee rights under

the Act.'" *Armstrong Circuit,* 462 F.2d at 357 (quoting *Hughes & Hatcher, Inc. v. ILRB,* [sic] 393 F.2d 557, 563 (6th Cir. 1968)).

The single most important factor I rely on in concluding that Sheffield's conversation with Vale did not violate the Act is Vale's testimony that he did *not* feel coerced by Sheffield's questioning.[1] The rule that the Board does not have to show that an "employee was in fact intimidated," *see NLRB v. Electric Steam Radiator Corp.,* 321 F.2d 733, 736 (6th Cir. 1963), and that the Board need only show that a given conversation "tends to interfere" with an employee's rights, *see Armstrong Circuit,* 462 F.2d at 357, has no application to a case in which the employee in question affirmatively testifies as to his subjective mental state at the time of the conversation. If the content and tenor of a given conversation "tends to interfere" with an employee's rights, we will infer, in the absence of evidence to the contrary, that the conversation was in fact coercive. Thus, it is true in such cases that the Board does not need to prove that the "employee was in fact intimidated." In the present case, however, there is evidence which squarely rebuts the inference of coercion: Vale's own testimony.

Several other elements of Vale's testimony add support to the conclusion that he was not coerced. First, in

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1. Vale testified as follows:

Q. Let me ask if during either conversation you had with Mr. Sheffield you felt intimidated in any way?

A. By Mr. Sheffield?

Q. Yes, sir.

A. He just asked me a question and I just answered it.

Q. But you didn't feel afraid, did you?

A. Afraid?

Q. Yes.

A. No, sir.

responding to Sheffield's inquiry as to the likelihood of a strike, Vale told Sheffield that he thought the employees probably would strike and then made a joke: "We wouldn't mind if you would save the old skids back there. We need it for a bonfire." Vale testified that Sheffield laughed at this remark. Second, Vale testified that he told Sheffield that he thought one of the supervisors should be fired. Third, there was nothing in Vale's testimony indicating that Sheffield made any statements which could be construed as an overt threat. Fourth, Sheffield did not question Vale about his personal feelings about a strike, only about the likelihood of a strike. Fifth, Sheffield commonly talked to employees and the conversation occurred at Vale's work station, where Vale presumably felt at ease, and not in Sheffield's office.

All of these factors lead to the conclusion that there was nothing coercive about Sheffield's conversation with Vale. Moreover, Vale's own testimony directly and expressly supports this conclusion. I would conclude that the Board's finding that this conversation was a violation of § 8(a)(1) of the Act is not supported by substantial evidence on the record considered as a whole.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated December 14, 1982)

[265 NLRB No. 36]

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO., DIVISION OF VAN DORN COMPANY	Cases 8-CA-11669, 8-CA-11842, and 8-CA-12243
and	
DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO	
and	Case 8-CA-12205
THOMAS W. VALE, an Individual	

DECISION AND ORDER

On November 12, 1980, the National Labor Relations Board issued its Order Remanding Proceeding to the Administrative Law Judge.[1] Thereafter, on May 18, 1981, Administrative Law Judge Robert G. Romano issued the attached Supplemental Decision in this proceeding. Subsequently, Respondent filed exceptions and a supporting

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1. 253 NLRB 268.

brief, and the Charging Party Union filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs filed after the Administrative Law Judge's initial Decision[2] and after his Supplemental Decision and has decided to affirm his rulings, findings, and conclusions,[3] as modified herein, and to adopt his recommended Order, as modified below.

The Administrative Law Judge originally decided, *inter alia*, that the Union had made a material misrepresentation which affected the outcome of the election. Although *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), was prevailing law at the time the Regional Director considered Respondent's objections to the election, the Administrative Law Judge applied the test set forth in *General Knit of California, Inc.*, 239 NLRB 619 (1978), which issued while the unfair labor practice case was pending before the Administrative Law Judge. On review, the Board agreed that retroactive application of the *General Knit* standard was proper, but remanded the case for further hearing, on the alleged misrepresentation. Subsequent to such hearing, the Administrative Law Judge issued his

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2. In its Order remanding this proceeding, the Board stated that it would consider the exceptions raised to the Administrative Law Judge's initial Decision after he had issued his Supplemental Decision. See 253 NLRB at 269, fn. 9.

3. We adopt, *pro forma*, in the absence of exceptions, the Administrative Law Judge's finding that Respondent did not violate an employee's right under *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Supplemental Decision, which is now before us for consideration.

On August 4, 1982, a Board majority overruled *General Knit* and returned to the rule of *Shopping Kart. Midland National Life Insurance Co.*, 263 NLRB No. 24. The Board also stated that, in accord with its usual practice, the new policy would be applied retroactively to all pending cases, no matter what stage they were in. (*Id.* sl. op., p. 21 at fn. 24.) Thus, since the Board will no longer analyze the truth or falsity of campaign statements, and will not set aside elections on the basis of misleading statements, we conclude that the Union's campaign material involved here was not objectionable, and that, therefore, the Union was properly certified as the collective-bargaining representative of Respondent's production and maintenance employees.[4] Accordingly, we agree with the Administrative Law Judge's conclusion that Respondent's general refusal to bargain with the duly certified representative of its employees is in violation of Section 8(a)(5) of the Act.

We now turn to a consideration of the remaining 8(a)(5) allegations and the various 8(a)(1) allegations at issue in this proceeding.

In his initial Decision, the Administrative Law Judge found that Respondent had violated Section 8(a)(1) by interrogating employees and by urging them not to support a strike, and by telling employees that it would never recog-

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4. As noted, above, *Shopping Kart* principles have previously been applied to the facts of this case.

Members Fanning and Jenkins adhere to their dissenting opinion in *Midland National, supra,* but consider themselves institutionally bound to apply the majority standard of that case until such time as it is reversed. Additionally, they would find, in agreement with the Administrative Law Judge's opinion in his Supplemental Decision, that the Union's campaign material was not objectionable under the *General Knit* standard.

nize the Union and that it would be useless for employees to go out on strike. We agree with these unfair labor practice findings.

In his original Decision, the Administrative Law Judge also made alternative findings, in the event that the Board found that the Union was, in fact, the proper bargaining representative in this proceeding. As the Administrative Law Judge in his Supplemental Decision has now found the Union is, in fact, the duly certified bargaining representative, he has entered the following findings with which we agree: (a) Respondent violated Section 8(a)(1) by telling employees that it would not bargain with the Union until the Federal courts determined if the election was a fair one; and (b) Respondent violated Section 8(a)(5) by failing to bargain with the Union concerning the effects of Respondent's unilateral change in its paid lunch policy, and by failing to supply certain information requested by the Union on March 7, 1978.

However, for the reasons that follow, we do not agree with the Administrative Law Judge's conclusion that Respondent did not violate its duty to bargain in two other respects.

1. The Unilateral Change in the Lunch Policy

The election in this case was conducted on April 22, 1977.[5] The Union received a majority of the ballots cast, and Respondent filed objections to the election on April 28. On May 27, the Regional Director recommended that the objections be overruled, and, on June 8, Respondent filed exceptions to that recommendation. On January 17, 1978, the Board adopted the Regional Director's findings

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5. All dates in this section are in 1977 unless otherwise indicated.

and recommendations and issued its Certification of Representative.

On October 7, during the pendency of its exceptions concerning the objections to the election, Respondent unilaterally changed its policy with respect to paid lunch periods. Respondent neither notified nor consulted with the Union about the change. Moreover, the Union never waived its right to bargain about the new policy. Approximately 35 employees were affected by the change in policy. It was stipulated at the hearing that Respondent instituted the change due to "business necessity."

In determining whether this unilateral change violated the Act, the Administrative Law Judge recognized the prevailing Board rule which holds that an employer acts at its peril when it unilaterally changes terms and conditions of employment while objections to an election are pending. Such changes ordinarily violate the Act if the union is ultimately certified.[6] However, the Administrative Law Judge focused on the Board's further statement in *Mike O'Connor Chevrolet* that "compelling economic considerations" could justify a unilateral change which might otherwise be prohibited. (*Id.* at 703.) He then concluded that the "business necessity" stipulated as the reason for the change here encompassed the "compelling economic considerations" envisioned by the Board in *Mike O'Connor Chevrolet*, and that therefore Respondent did not violate Section 8(a)(5) and (1) of the Act. We do not agree.

The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and con-

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6. *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., et al.*, 209 NLRB 701, 703-704 (1974), *reversed on other grounds* 512 F.2d 684 (8th Cir. 1975).

ditions of employment.[7] Once the General Counsel has made a *prima facie* showing of an 8(a)(5) violation—as has been done here—a respondent must demonstrate why the refusal to bargain was privileged. In the instant case, Respondent was responsible for showing that "compelling economic considerations" warranted its acting unilaterally. This, it has not done here.

Contrary to the Administrative Law Judge, we do not believe that the term "business necessity," without more, encompasses the concept of "compelling economic considerations." Indeed, the fair import of the Board's statements in *Mike O'Connor Chevrolet* is that the circumstances amounting to "compelling economic considerations" would be rare. Thus, "business necessity" may well encompass considerations beyond the realm of "compelling economic considerations." Indeed that which makes good "business" sense is not at all the equivalent of a "compelling economic consideration." The stipulation entered into by Respondent is simply insufficient to allow us to evaluate in light of our prevailing standard Respondent's reasons for the change. Therefore, we find Respondent's asserted defense, without more, falls short and we conclude it violated Section 8(a)(5) and (1) of the Act by changing its paid lunch policy.[8]

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7. *Han-Dee Pak, Inc.*, 249 NLRB 725 (1980); *Master Slack and/or Master Trousers Corp.*, 230 NLRB 1054 (1977). Indeed, in the context of unilateral modifications of existing contract terms, the Board has held that an "economic crisis" was an irrelevant defense to an alleged 8(a)(5) violation. *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973).

8. Member Zimmerman would adopt the Administrative Law Judge's recommendation to dismiss the alleged 8(a)(5) violation concerning Respondent's change of its paid lunch policy. In his view, the distinction drawn by the Board between "business necessity" and "compelling economic consideration" is unsupportable. The stipulation that Respondent's action in this regard was motivated by "business necessity" plainly encompasses more than the "good 'business' sense" the majority passes it off as. Had the stipulation meant what his colleagues say it means, Member Zimmerman would not hesitate to join them. The plain language of the stipulation, however, prohibits such a finding.

2. The change in the absentee control system

The Administrative Law Judge also determined that Respondent did not unilaterally institute a new absentee control system in June 1978.[9] He concluded, *inter alia*, that the the [sic] system antedated the announcement of the plan to employees, and that the mere publication of the plan by Respondent did not violate the Act. We do not agree.

The General Counsel presented evidence that Respondent, in June, sent a letter to employees outlining how its "absence control" program was administered because, as the letter explained, of "some confusion as to how the attendance program works." The letter stated the "program has been in use at several Van Dorn plants for a number of years," and explained the weighting factors for categories of absences.[10] The letter also prescribed the disciplinary procedure to be followed when an employee reached a weighted total of seven points under the absence categories.

Although Respondent presented contradictory evidence about when the seven-point disciplinary program became effective at the plant involved here, the Administrative Law Judge credited the testimony of Employee Relations Manager Kupec that the system had been in effect since "at least" January. In July, however, in response to an employee complaint that the new attendance policy had been made retroactive to January without notification to employees, Kupec signed a document on behalf of Respondent stating that the effective date of the program explained in the letter mentioned above was July 1.

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9. All dates in this section are in 1978 unless otherwise indicated.

10. For example, an employee would receive no points for an excused absence, and two points for an unexcused absence.

We agree with the General Counsel that a *prima facie* violation of the Act has been made out here. As the Administrative Law Judge found, employees generally, and even some supervisors, were not aware of Respondent's use of the strict point attendance system. Thus, the publication of the program to employees presented, to them, a new attendance policy. Since Respondent neither notified nor bargained with the Union concerning the policy, which clearly affected terms and conditions of employment, the change of the policy as announced to employees presented a *prima facie* violation of Section 8(a)(5). Contrary to the Administrative Law Judge, we do not believe that Respondent has sufficiently rebutted this *prima facie* case.

The Administrative Law Judge found the point system had been in effect since January. This fact itself reflects that Respondent changed its system during the pendency of objections. That employees did not complain about the system until June merely indicates that Respondent never notified employees, or the Union, of the new system until it sent the letter to employees in June. While it may be arguable that the mere publication of a previously unadvertised but existing discipline policy is not in and of itself a violation of the Act,[11] the notification and enforcement of a new system is undeniably still a unilateral change in terms and conditions of employment. Moreover, irrespective of Respondent's prior use of the seven-point attendance policy, Respondent informed at least one employee that the system was not effective until July 1. The Administrative Law Judge recognized this fact, but found that Respondent was starting fresh records for all employees "inasmuch as [Respondent was] publishing the program for the first time to all employees . . . ."

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11. But see *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1198, 1208 (1978); *Southland Paint Company, Inc.*, 157 NLRB 795, 796 (1966).

Although this "forgiveness," as the Administrative Law Judge characterized it, was not alleged as a violation of the Act, it illustrates the change in the system Respondent was installing. In sum, Respondent has all but conceded there was *some* change in the attendance system. It neither notified nor bargained with the Union about the change, and thereby violated Section 8(a)(5) and (1) of the Act.

Amended Supplemental Conclusions of Law

Delete paragraphs 3(5)(b) and 3(6) of the Administrative Law Judge's Supplemental Conclusions of Law and add the following to paragraph 3:

"(b) By refusing, on and after February 22, 1978, to recognize, meet, and bargain with the Union as the certified exclusive bargaining representative of the above unit of employees, including refusing to meet and bargain with the Union over the decision to change its paid lunch policy and the effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; and by refusing, commencing on or about March 7, 1978, to furnish the Union with certain requested data relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of the Respondent in the above appropriate unit, Respondent has violated Section 8(a)(5) and (1) of the Act."

"(d) By unilaterally changing its absentee/tardiness policy, Respondent has violated Section 8(a)(5) and (1) of the Act."

Amended Remedy

Having found that Respondent unlawfully unilaterally changed its paid lunch policy, we shall order Respondent to make employees whole for any loss of benefits from Re-

spondent's unlawful conduct. Interest on the amount lost shall be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).) We shall also order Respondent to restore the status quo by rescinding its unilateral change. Having also found that Respondent unlawfully unilaterally instituted a change in its attendance/tardiness program, we shall order that Respondent fully restore the status quo which existed at the time of its unlawful actions by rescinding and expunging from its records all disciplinary actions resulting from the unlawful change, and that Respondent make whole the employees adversely affected by Respondent's unilateral change in its attendance/tardiness program including, as appropriate, immediate and full reinstatement to their former jobs, or, if those jobs are unavailable, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges. We shall further order that these employees be made whole for any loss of earnings, the amounts to be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel, supra.*[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

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12. See, generally, *Isis Plumbing, supra.*

1. Substitute the following for paragraph 2(d):

"(d) Refusing, in violation of Section 8(a)(5) and (1) of the Act, to recognize, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including refusing to meet and bargain with the Union over the decision and effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; refusing to meet and bargain with the Union over Respondent Employer's unilateral change in its attendance/tardiness program; and refusing to furnish the Union with certain data requested by the Union for purposes of collective bargaining and relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Respondent in the above appropriate unit."

2. Substitute the following for paragraph 2(a):

"(a) Recognize and, upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the decision and effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees and its absence/tardiness program, and, if an understanding is reached, embody such understanding in a signed agreement; and, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Respondent in the above appropriate unit."

3. Add the following as paragraph 2(b), and reletter the subsequent paragraph:

"(b) Restore the status quo, and make employees whole for lost earnings and benefits as prescribed in the

section of the Board's Decision and Order entitled 'Amended Remedy' "

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 14, 1982

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
DON A. ZIMMERMAN, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to recognize, meet, and bargain with District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL—CIO, as the certified exclusive collective-bargaining representative of the employees in the unit described below:

> All employees and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technicians, research and development employee(s), truck drivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike, or tell our employees that we will not bargain with the Union until the Federal courts have determined whether the election was a fair one.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL recognize and, upon request, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the decision and effects of our prior unilateral change in paid lunch policy for certain employees, and the change in our absentee/tardiness program and, if an understanding is reached, embody such understanding in a signed agreement; and WE WILL, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all our employees in the above appropriate unit.

WE WILL restore the status quo by revoking the unilateral change in the paid lunch policy and absentee/tardiness program, and WE WILL make whole employees who were denied pay, discharged, suspended, or otherwise denied work opportunities solely as a result of the unilateral changes set forth above, with interest, and WE WILL rescind and expunge all records of disciplinary actions resulting from the unilateral change in the absence/tardiness program, and WE WILL offer employees discharged, sus-

pended, or otherwise denied work opportunities solely as a result of the unilateral change in the absence/tardiness program immediate and full reinstatement to their former positions or, if those jobs are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3733.

ORDER OF THE NATIONAL LABOR RELATIONS BOARD REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

(Dated November 12, 1980)

253 NLRB No. 29

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO., DIVISION OF VAN DORN COMPANY	Cases 8-CA-11669
and	8-CA-11842
DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO	8-CA-12243
and	Case 8-CA-12205
THOMAS W. VALE, an Individual	

ORDER REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

On March 31, 1980, Administrative Law Judge Robert G. Romano issued his Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions. For the reasons explained below, the Board has decided to remand this proceeding to the Administra-

tive Law Judge for a further hearing and for a supplemental decision.

The amended consolidated complaint in this proceeding alleged, *inter alia,* that since February 22, 1978, Respondent had refused to meet and bargain with the Union as the certified bargaining representative of certain of Respondent's employees in an appropriate unit and that this refusal to meet and bargain violated Section 8(a)(5) and (1) of the Act. However, since he found that the Union was not entitled to certification based upon the related representation proceeding,[1] the Administrative Law Judge concluded that Respondent's refusal to bargain was not a violation of Section 8(a)(5) and (1) of the Act.

In reaching this conclusion, the Administrative Law Judge noted the following facts from the representation proceeding in Case 8-RC-10830. In its Objection 8, Respondent alleged that, on the day of the election, which the Union won, the Union had distributed a flyer

> . . . containing what purported to be a copy of one of the Union's contracts, containing provisions for wage rates for various job classifications, pension and premium pay. . . . In fact, such "contract" was a forgery in that there are no fixed wage rates contained in the actual contract, and there are no provisions for set-up, leadman, or instructional premiums.

The Regional Director applied the then-prevailing law of *Shopping Kart Food Market, Inc.*,[2] and found that, because the flyer did not involve a forgery or an improper involvement of the Board and its processes, it was not objectionable. On January 17, 1978, following exceptions by Re-

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1. Case 8-RC-10830.
2. 288 NLRB 1311 (1977).

spondent, the Board (by a panel of Chairman Fanning, Member Jenkins, and then Member Walther) adopted the Regional Director's recommendations, which resulted in a certification being issued to the Union.[3]

Thereafter, Respondent refused to bargain with the Union as the certified bargaining representative of certain of its employees. This refusal along with other of Respondent's actions was alleged to be an unfair labor practice in the amended consolidated complaint in this proceeding. A hearing on this complaint was held on dates in October and December 1978. At the hearing in the instant proceeding, Respondent attempted to relitigate the issue of the leaflet, but, upon objection, the Administrative Law Judge ruled that Respondent was precluded from raising in this unfair labor practice proceeding issues which were raised and disposed of in the representation proceeding in Case 8-RC-10830. Accordingly, no additional evidence involving the leaflet was introduced.

Thereafter, on the last day of the hearing and without the parties' knowledge, the Board issued its Decision in *General Knit of California, Inc.*,[4] overruling *Shopping Kart*, and returning to the standard of review for alleged misrepresentations set out in *Hollywood Ceramics Company*,

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3. With regard to the campaign flyer, Chairman Fanning and Member Jenkins stated at fn. 2 of the January 17 Decision:

> Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Market, Inc.*, 228 NLRB No. 190 (1977) the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra*, and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

4. 239 NLRB 619 (1978) (Members Penello and Murphy dissenting separately).

Inc.[5] That standard indicated, *inter alia,* that a misrepresentation which may reasonably be expected to have a significant impact on the election will cause it to be set aside. The Administrative Law Judge analyzed what effect the Board's reversal of *Shopping Kart, supra,* in *General Knit, supra,* had on the unfair labor practices alleged in this proceeding. He determined, and we agree, that *General Knit* is controlling.

The Administrative Law Judge then analyzed Objection 8 under the criteria of *General Knit, supra,* but he did so based only on the formal papers submitted in the representation proceeding. As set out in his Decision, these papers include the formal objection itself, with exhibits attached; the Regional Director's comments in his report on the objection; Respondent's exceptions to the Regional Director's report; and the Board's Decision adopting the report.[6] From this material, the Administrative Law Judge concluded that there were material misrepresentations in the flyer, involving wage rates, which warranted the setting aside of the election under *General Knit.* He accordingly dismissed the allegations of the complaint alleging an 8(a)(5) violation.

Both the General Counsel and the Charging Party have excepted to this portion of the Administrative Law Judge's Decision and they urge that the issue be remanded for a full hearing.[7] They argue that the Administrative Law Judge was in error in relying solely on the papers in the representation proceeding in analyzing the objection. They note that, notwithstanding the Regional Director's com-

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5. 140 NLRB 221 (1962).

6. There was no hearing on any of the objections in the representation proceeding.

7. As an alternative argument, the Union claims no hearing is necessary to find in its favor.

ments on the alleged misrepresentations in the flyer, he resolved the case based on the application of *Shopping Kart.*

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having duly considered the matter, is of the opinion that there exist material issues of fact and law concerning Objection 8 which warrant a remand of this proceeding to the Administrative Law Judge for the purposes of conducting a further hearing on that objection under *General Knit, supra.* The Board is not satisfied that the representation proceeding in Case 8-RC-10830, which was conducted entirely under the standard set out in the now-overruled *Shopping Kart* Decision, was sufficient to resolve the objection.[8]

Accordingly, it is hereby ordered that this proceeding be remanded to Administrative Law Judge Robert G. Romano for the purpose of conducting a further hearing with regard to Respondent's Objection 8 in Case 8-RC-10830 in light of the Board's Decision in *General Knit of California, Inc.,* 239 NLRB 619. At the hearing, all parties shall be allowed to adduce whatever evidence they deem pertinent on that objection.

IT IS FURTHER ORDERED that, upon the conclusion of the hearing, the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision

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8. In this regard, the Board does not find it significant that the Union did not except to certain of the Regional Director's comments. As the then-prevailing law of *Shopping Kart* did not call for such comments, the Regional Director's observations there were in the nature of *dicta.* And, given the law under *Shopping Kart,* the Board finds the Union was not duty bound to respond to these comments which were not an essential element of the Regional Director's report.

containing findings of fact, conclusions of law, and recommendations based on the evidence received at the reopened hearing and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, shall be applicable.[9]

Dated, Washington, D.C. November 12, 1980

JOHN H. FANNING, Chairman
HOWARD JENKINS, JR., Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

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9. The Board is aware that, in addition to the general refusal to meet and bargain allegation of the complaint, Respondent is alleged to have violated Sec. 8(a)(5) and (1) of the Act in various other respects. The Board is also aware that the Administrative Law Judge recommended dismissal of these allegations based on his finding no general duty to bargain on Respondent's part. However, the Board is further cognizant that the Administrative Law Judge made certain alternative findings on these 8(a)(5) allegations; i.e., assuming a valid certification of the Union, the Administrative Law Judge then passed on each 8(a)(5) violation alleged. He found certain violations and dismissed others. The parties have excepted to those findings which are adverse to them as to certain findings on 8(a)(1) allegations. The Board reserves ruling on all these additional allegations, many of which may be dependent on the validity or lack thereof of the certification in Case 8-RC-10830. When the Administrative Law Judge has ruled in his Supplemental Decision on the issue remanded, his recommended Order will reflect that Supplemental Decision and the Board will then pass on any exceptions raised to that Supplemental Decision.

MEMBER PENELLO, dissenting:

Once again, the *General Knit*[10] majority upsets a certification validly issued under *Shopping Kart*. Once again, the employees' desires as expressed at the ballot box are frustrated. Once again, I must dissent.

The facts tell the all too familiar story of delay, delay, delay. On April 22, 1977, the employees voted for union representation in a secret-ballot election. From that time to the present day, the parties have been locked in litigation over the status of the bargaining agent and related issues, and the employees have been deprived of the services of their duly elected representative. My colleagues' decision serves only to exacerbate the problem by remanding this seemingly endless proceeding for yet further litigation concerning Respondent's misrepresentation objection that was properly overruled under *Shopping Kart* when the Board certified the Union almost 3 years ago. I find this result intolerable.

Even should the Union eventually prevail, the eroding effects of time and employee turnover would render the certification virtually worthless in terms of effective collective bargaining.

I would direct Respondent to the bargaining table now.

Dated, Washington, D.C. November 12, 1980

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

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10. *General Knit of California, Inc.*, 239 NLRB 619 (1978). As I stated in my *General Knit* dissent, I adhere to the sound principles of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

NATIONAL LABOR RELATIONS BOARD'S DECISION AND CERTIFICATION OF REPRESENTATIVE

(Dated January 17, 1978)

Case 8-RC-10830

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY
Employer

and

DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held April 22, 1977[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby

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1. The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 151 for, and 131 against, the Petitioner; there were no challenged ballots.

adopts the Regional Director's findings and recommendations.[2]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

Dated, Washington, D. C., January 17, 1978.

JOHN H. FANNING, Chairman
HOWARD JENKINS, JR. Member
BETTY SOUTHARD MURPHY, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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2. Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977) the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra* and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT VACATING JUDGMENT OF JUNE 6, 1984

(Filed July 23, 1984)

Nos. 83-5012
83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge,* JONES and CONTIE, *Circuit Judges.*

Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, respondent has moved this Court to vacate the judgment entered by the Court upon the opinion of the Court filed herein on June 6, 1984. No objections having been filed,

It is ORDERED that the judgment entered on June 6, 1984, be and it hereby is vacated.

It is further ORDERED that a judgment in the form attached herewith be entered this date.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 23, 1984)

Nos. 83-5012
83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge,* JONES and CONTIE, *Circuit Judges*

This cause came on to be heard upon a petition filed by Van Dorn Plastic Machinery Company, to review an order of the National Labor Relations Board, issued against said Petitioner, its officers, agents, successors and assigns, on December 14, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 21, 1984, and has considered the briefs and transcript of record filed in this cause. On June 8, 1984, the Court, being fully advised of the premises, handed down its opinion enforcing in part, denying in part, vacating in part and remanding in part the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that enforcement of the Board's order is denied insofar as it finds a violation of the Act consisting of a unilateral implementation of an attendance control policy;

FURTHER ORDERED AND ADJUDGED by the Court that the Board's order is vacated insofar as it finds a violation of the Act in Petitioner's change in its paid lunch period policy and that this portion of the case is remanded to the Board for further proceedings; and

FURTHER ORDERED AND ADJUDGED by the Court that the Petitioner, Van Dorn Plastic Machinery Company, Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning the status of a strike vote and urging employees not to support a strike.

(b) Telling Petitioner's employees that Petitioner will never recognize District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter called the Union), and that it would be useless for employees to go out on strike.

(c) Telling Petitioner's employees that Petitioner will not bargain with the Union until the federal courts have determined whether the election was a fair one.

(d) Refusing, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (hereinafter called the Act), to recognize, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of Petitioner's employees in the appropriate

bargaining unit,[1] including refusing to meet and bargain with the Union over the effects of Petitioner's change in its paid lunch policy for certain employees and refusing to furnish the Union with certain data requested by the Union for purposes of collective bargaining and relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Petitioner in the above appropriate unit.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the effects of Petitioner's change in its paid lunch policy for certain employees, and, if an understanding is reached, embody such understanding in a signed agreement; and, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Petitioner in the above appropriate unit.

(b) Post at its plant in Strongsville, Ohio, copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for

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1. The appropriate bargaining unit is:

All production and maintenance employees, including leadmen working at the employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank, and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

Region 8 of the National Labor Relations Board (Cleveland, Ohio), after being duly signed by Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within twenty (20) days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN,
Clerk

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WE WILL NOT refuse to recognize, meet, and bargain with District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO, as the certified exclusive collective-bargaining representative of the employees in the unit described below:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank, and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike; or tell our employees that we will not bargain with the Union until the federal courts have determined whether the election was a fair one.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the effects of our prior change in paid lunch policy for certain employees, and, if an understanding is reached, embody such understanding in a signed agreement; and WE WILL, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all our employees in the above appropriate unit.

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3733.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 17, 1984)

No. 83-5012
No. 83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge;* JONES and CONTIE, *Circuit Judges.*

No judge in regular active service on the court having requested en banc consideration of the petition for rehearing filed herein, the petition has been referred to the hearing panel. Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of this appeal and that rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

LETTER SENT TO VAN DORN EMPLOYEES FROM INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS WITH ATTACHMENTS

JAMES N. IAFELICE, President
Affiliated with AFL-CIO
Phone: (216) 241-0290

EDWYNE Moss, Sec'y-Treas.
2906 Euclid Avenue
Cleveland, Ohio 44115

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
DISTRICT 54

ATTENTION: VAN DORN EMPLOYEES

You recently received a pamphlet entitled Van Dorn verses the Machinists. This pamphlet like all other material given out through the years by Van Dorn was distorted and twisted the truth. But that's understandable when you consider the fact that Van Dorn didn't have an awful lot to do with writing it. Instead it was written by a professional whose very expensive livelyhood [sic] depends on his ability to keep the working people of this contry [sic] confused and divided.

Most professionals such as the author of Van Dorn VS the I.A.M. belong to the Bar. Most companies such as Van Dorn belong to the Associated Industries or National Association of Manufacturer [sic]. They are members in good standing and probably pay all fees and live up to all obligations placed on them by their (Union) oops organizations. If they need the protection of an organization with all their power and wealth, Why shouldn't you have your organization to protect your interest?

A. Consider these facts not once does the word agreement appear in Van Dorns [sic] Policy Manual.

B. The plant that was suppose [sic] to have I.A.M. negotiated rates show no location or identification of area rates.

C. Van Dorn wage and benefits were duplications of the one given out in 1974 with no improvements.

D. Van Dorn profits have increased immensely since 1974.

As a result of many mistatements and omissions we have decided to fill in the spaces left vacant by the company. I have attached some rates and language from one *of our* I.A.M. & A.W. contracts these rates are in effect until April 30th, when a new *contract* will be negotiated. Omitted from Van Dorn VS I.A.M. was some policy statement from Van Dorn employees *Manual.* I have filled in those blank spaces also.

CLARENCE DAVIS
Organizer
District #54, IAM & AW

ED MOSS
Secretary-Treasurer
District #54, IAM & AW

Between NELSON STUD WELDING COMPANY party of the first part, and hereinafter referred to as "The Employer", and the INTERNATIONAL ---- ---TION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. --- --- its affiliated Local Lodges signatory to this Agreement, party of th- ----- -art hereinafter referred to as "The Union."

[Commencing as of May 1, 1976 the Employer shall pay into the Pension Trust Fund an additional hourly contribution of ten cents (10¢) per hour worked for a contribution rate of sixty cents (60¢) per hour.]

1.	Tool and Die Make--	$10.78
2.	Tool and Die Machin----	$ 9.78
3.	Senior Electronics Te--	$ 9.88
4.	Electronic Tech.	$ 9.47
5.	Maintenance Machinist	$ 9.76
6.	Maintenance Welder	$ 9.76
7.	Journeyman Machinist	$ 9.03
8.	Journeyman Welder	$ 9.03
9.	Automatic Screw Machinist	$ 9.13
10.	Journeyman Painter	$ 9.04
11.	Die Setter and Adjuster	$ 8.27
12.	Specialist	$ 7.71
13.	Tool Crib Attendant	$ 7.71
14.	Shop Janitor	$ 6.91

Section 8. Pay for Set-up Men, Leadmen, Instructors

(a) When an employee is specifically assigned to set up machi--- --- other employees, he shall receive not less than ten percent (10%) above the h----st rate of pay for the classification set up. Set-up men are defined as employees, other than Die Setters and Machine Adjusters, who are assigned to set up work for others. A Set-up Man may periodically check the proper functioning of the operation he sets up. In exception to the above, employees who set up for Specialists shall receive not less than the Journeyman Machinist rate of pay.

(b) When an employee is specifically assigned to instruct other employees, he shall receive not less than ten percent (10%) above the rate of pay for the highest classification instructed.

(c) When an employee is specifically assigned as Leadman, he shall receive not less than ten percent (10%) above the rate of pay for the highest classification led, or five percent (5%) above his own classification rate, whichever is greater. A Leadman may have the responsibility for direction of personnel, including instruction and assignment of work, and for the set-up, adjustment and proper functioning of equipment.

Section 3. Study of Job Evaluation For Manufacturing Concerns:

It is agreed that the parties herein will meet at the request of either party to discuss a job evaluation system to meet the requirements of the manufacturing operations of the Employer. It is further agreed that no job evaluation program shall be installed except by express agreement in writing between the Employer and the Union.

THESE ARE THE EXCERPTS FROM THE VAN DORN EMPLOYEE'S MANUAL - NOT FOUND IN OUR CONTRACTS. THIS IS CALLED NON-UNION SECURITY.

	First Offense	Second Offense	Third Offense	Fourth Offense
1. Reckless driving on Company property.	Written Warning	One Day Suspension	Three Day Suspension	Discharge
2. Threatening, intimidating, coercing, or interfering with fellow employees on Company premises.	Written Warning	Three Day Suspension	Discharge	
3. Gambling or engaging in lottery on Company time.	Five Day Suspension	Discharge		
4. Falsifying personnel records.	Discharge			
5. Knowingly punching the time card of another employee, having one's time card punched by another employee, or unauthorized altering of a time card.	Discharge			
6. Absent and unreported for three consecutive working days.	Discharge			
7. Leaving plant during working hours without authorization.	Discharge			
8. Reporting for work while under the influence of alcohol or drugs.	Discharge			
9. Drinking alcoholic beverages on Company premises.	Discharge			

10.	Operating, using, or possessing Company machines, tools, or equipment to which employee has not been assigned to work or authorized to use.	First Offense [sic]
11.	Flagrant violation of Company safety rules.	Discharge
12.	Sleeping on job during working hours.	Discharge
13.	Distributing written or printed matter of any description or the taking of any types of surveys in work areas during work times without management approval.	Discharge
14.	Immoral behavior.	Discharge
15.	Provoking or instigating a fight during working hours or on Company premises.	Discharge
16.	Willful attempt to injure others or possession of dangerous weapons or explosives on Company property.	Discharge
17.	Insubordination.	Discharge
18.	Destroying or defacing Company or employee property.	Discharge
19	Theft or unauthorized removal from the premises of any Company or employee property.	Discharge

	First Offense	Second Offense	Third Offense	Fourth Offense	Fifth Offense	Sixth Offense
1. Parking vehicles in an unauthorized area.	Verbal Warning	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge
2. Creating or contributing to unsanitary conditions or poor housekeeping.	Verbal Warning	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge
3. Failure to ring in or out when entering or leaving the Company premises at any time.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
4. Soliciting or collecting contributions for any purpose whatsoever unless authorized by management.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
5. Posting or removing notices, signs, or writing in any form on bulletin boards or Company property at any time without specific authority of management.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
6. Excessive garnishments.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
7. Abuse of consumption of refreshments which causes interference with production.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
8. Smoking on job which interferes with production or in areas prohibited.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
9. Violation of safety rules or safety practices.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
10. Failure to follow instructions.	Verbal Warning	Verbal Warning	Written Warning	Three Day Suspension	Discharge	

	First Offense	Second Offense	Third Offense	Fourth Offense
Falsifying Company records unless management determines there were extenuating circumstances.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Habitual tardiness or absenteeism without reasonable cause.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Refusal to work assigned overtime without reasonable cause.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Entering restricted areas without specific permission.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Engaging in horseplay, scuffling, or throwing things.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Wasting time, inattention to work, loitering, or leaving place of work or department during working hours.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Poor performance or productivity.	Verbal Warning	Written Warning	Three Day Suspension	Discharge

VAN DORN COMPANY

2700 East 79th Street
Cleveland, Ohio 44104
Phone 216 361-5234

LAWRENCE C. JONES
Chairman and President

March 24, 1977

To Investors:

As recently announced, the quarterly cash dividend has been increased from 11 cents per share to 12½ cents per share, effective with payment to be made May 13, 1977, to shareholders of record on April 15. This action raises the annual dividend to 50 cents per share and represents the third increase in the quarterly cash dividend over the past 11 months, the result of improved earnings and an encouraging outlook for the future.

The audit has been completed and sales and earnings for the year 1976 compared to 1975 figures were:

	For Three Months Ended December 31		For 12 Months Ended December 31	
	1976	1975	1976	1975
Sales	$35,787,000	$28,379,000	$135,817,000	$99,952,000
Income Before Taxes	1,514,738	2,264,608	8,744,653	5,409,372
Taxes	637,700	1,107,000	4,248,000	2,602,000
Net Income	877,738	1,157,608	4,496,653	2,807,372
Net Income Per Share	.29	.39	1.50	.94

While both sales and earnings established new dollar highs, it is necessary to consider the effects of inflation when comparisons are made to previous record years. Earnings for the past year amounted to 3.3 cents on each dollar of sales, which are considerably below our potential. It is obvious that there is room for improvement, which I believe can be achieved this year.

In comparing the above quarterly earnings, two points should be noted: first, the 1975 fourth quarter was, and is, the best fourth quarter in the history of the company, and, second, in 1976 we experienced a greater than normal fourth quarter decline in the earnings of certain *container operations* as a result of cost increases not covered by price increases.

The last dividend enclosure reported problems caused by severe weather and the natural gas shortage. We did experience some shutdowns during January and February. While this problem had an adverse effect on some operations, I am pleased to report that shipments overall for the first two months of 1977 are 25% ahead of those for the same period of 1976, the result of increased shipments of *plastic molding machines*.

The annual report will be mailed to you about April 15 and the annual meeting will be held on Saturday, May 7, at the Sheraton Inn, 26300 Chagrin Boulevard, Beachwood, Ohio 44122, at 10 a.m. As they say in Georgia, "Y'all come."

Sincerely,

/s/ L. C. JONES
L. C. Jones
Chairman

LCJ/m

LETTER TO EMPLOYEES FROM SAMUEL H. SMITH, JR.

May 4, 1978

Dear Fellow Employees:

In our previous communications, we have endeavored to truthfully communicate the facts surrounding union activities. On the other hand, the I.A.M. has chosen to use a less than truthful approach. For example, in their letter to members of April 28, there are several misstatements. We thought you ought to know the true facts.

> First, the Company did not state that it had no intention of negotiating a contract. What the Company did say was that it would not bargain with the Union until the Federal Courts have determined whether the election was a fair one.
>
> Second, appeals *have* not been exhausted. The National Labor Relations Act provides as follows:
>
> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any *circuit court of appeals* of the United States. . ."
>
> The appeals process has already been set into motion by the fact that the I.A.M. filed an unfair labor charge on April 10.

In view of this information, the question must be asked: Why is the Union again asking for a strike vote? On April 2 in a vote conducted by the I.A.M., the employees of Van Dorn voted not to strike. We believe that serious questions must be raised as to the I.A.M.'s motivation to call for another strike vote when a peaceful alternative

has already been selected by our employees. Why does the Union want you to lose your wages and benefits when you don't have to go on strike to have the Courts decide whether the election was fair or not?

In addition to the Union's letter of April 28, many of you also received a copy of the Union demands to the Company. It is important to understand that these demands *don't* have any relevance to a strike vote. *Even if* the Company recognized the I.A.M. as your bargaining agent, there could be *no guarantee* that *any* of these demands would be met.

The I.A.M. has made a selective mailing announcing their meeting. We encourage you to consider these facts and strongly urge *all* of you to attend the Union meeting on May 7 to exercise your right to vote. Don't let a small minority determine the fate of the majority.

If you have any questions regarding this matter, please ask your Supervisor.

Sincerely yours,

/s/ SAM SMITH
Samuel H. Smith, Jr.

SHS/lm

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

(October 25, 1978)

* * * * *

[76] RECROSS-EXAMINATION

Q. (By Mr. Ashmus) Let me ask if during either conversation you had with Mr. Sheffield you felt intimidated in any way?

A. By Mr. Sheffield?

Q. Yes, sir.

A. He just asked me a question and I just answered it.

Q. But you didn't feel afraid, did you?

A. Afraid?

Q. Yes.

A. No, sir.

Mr. Ashmus: No other questions.

* * * * *

84-647

No.

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CLERK

In the Supreme Court of the United States

October Term, 1984

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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DECISION OF THE ADMINISTRATIVE LAW JUDGE OF THE NATIONAL LABOR RELATIONS BOARD

(Dated March 31, 1980)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY

and Case Nos. 8-CA-11669

DISTRICT LODGE 54 OF THE 8-CA-11842
INTERNATIONAL ASSOCIATION 8-CA-12243
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

and Case No. 8-CA-12205

THOMAS W. VALE, an Individual

John A. Simonetti, Esq., for
the General Counsel.

Robert L. Larson and
Keith Ashmus, Esqs. (Thompson,
Hine & Flory), of Cleveland,
OH, for the Respondent.

Mr. Clarence Davis, Jr., of
Cleveland, OH, for the
Charging Party Union.

Mr. Thomas Vale, of Grafton, OH,
Individual Charging Party.

DECISION

Statement of the Case

ROBERT G. ROMANO, Administrative Law Judge: These consolidated cases were heard on October 24, 25 and December 6, 1978.[1] Charge in Case No. 8-CA-11669 was filed by District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO (Charging Party Union herein) on January 25 (amended March 28); and an original complaint thereon issued on March 29 alleging that Van Dorn Plastic Machinery Co., Division of Van Dorn Company (Respondent herein) had engaged in certain conduct in violation of Section 8(a)(1) and (5) of the Act in that Respondent (during pendency of certain Employer objections to conduct of and conduct affecting election) unilaterally instituted a new policy with respect to paid lunch periods. Respondent filed Answer to said complaint essentially denying the commission of any unfair labor practices and raising certain affirmative defenses. Charge in Case No. 8-CA-11842 was filed by Charging Party Union on April 10; and Order Consolidating Cases, Complaint and Notice of Consolidated Hearing issued on May 3, alleging further violations of Section 8(a)(1) and (5) in Case No. 8-CA-11842, *inter alia*, including that Respondent has refused to meet and bargain with the Union after the Union was certified as the collective-bargaining representative. The charge in Case No. 8-CA-12205 was filed by Thomas W. Vale (an Individual Charging Party herein) on August 21; and the charge in

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1. All dates referenced herein are in 1978 unless otherwise stated. Hearing was reopened on December 6 on grant of motion made by General Counsel.

Case No. 8-CA-12243 was filed by Charging Party Union on September 6. On October 11, Order Consolidated Cases, Amended Consolidated Complaint and Notice of Consolidated Hearing issued in Case Nos. 8-CA-11669, 8-CA-11842, 8-CA-12205 and 8-CA-12243, alleging refusal to bargain in violation of Section 8(a)(5) and several independent violations of Sections 8(a)(5) and (1). Respondent filed answer thereto on October 20, incorporating its prior answer (including affirmative defenses) essentially denying the commission of any of the unfair labor practices alleged and contending the underlying certification of the Union is invalid.

Upon the entire record including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and the Respondent on or about January 24, 1979, I make the following:

Findings of Fact

I. Jurisdiction

Jurisdiction is not in issue. The Company, an Ohio corporation, *inter alia,* operates a plant facility at Strongsville, Ohio, where it is engaged in the manufacture of plastic injection molding equipment. Annually, in the course and conduct of its business, the Company ships from its Strongsville, Ohio facility goods valued in excess of $50,000 directly to points located outside the State of Ohio. The Complaint alleges, Respondent by Answer admits, and I find: that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The underlying representation case background:*

A petition in Case No. 8-RC-10830 was filed on March 3, 1977; and the parties entered a Stipulation for Certification Upon Consent Election on March 15, 1977.[2] Pursuant thereto an election was conducted on April 22, 1977. The results of the election reveal that of approximately 293 eligible employees, 282 valid votes were counted of which 151 votes were cast for the Petitioner and 131 votes were cast against the participating labor organization. On April 28, 1977 the Employer filed Objections to Conduct of the Election and Objections to Conduct Affecting the Results of the Election. (The Objections as filed raised claims that the election was invalid because of: an approximate 15-minute delay in the start of election; alleged improper campaigning in the polling area; certain alleged improper instructions issued to the observers; a claim of misrepresentation by the Union as to whether the employees had pension coverage provided to them by their Employer; and as is deemed particularly pertinent (*infra*) that there is objectionable grounds warranting the election to be set aside due to certain claims of "forgery, fraud and misrepre-

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2. Therein the parties agreed, the complaint herein alleges, and I find, that the following employees at Respondent's Strongsville, Ohio place of business constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employees(s) truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

sentation" engaged in by the Union in its distribution of a Union "flyer" allegedly on the election day. On May 27, 1977, the Board's Regional Director for Region 8 issued his Report on Objections concluding that the Employer's Objections did not raise any substantial or material issues of either fact or law with respect to the election and that they were all without merit; and the Regional Director accordingly recommended to the Board that the aforesaid Objections be overruled and that a Certificate of Representative be issued in favor of District Lodge 54, International Association of Machinists and Aerospace Workers, AFL-CIO. On June 8, 1977, the Employer filed Employer's Exceptions to Regional Director's Report on Objections. On January 17, 1978, the Board issued its Decision and Certification of Representative, adopting the Regional Director's findings and recommendations and issued its Certification of Representative.

B. *Preliminary Statement of the Resulting Issues*

The parties appear to be in essential agreement that the complaint (as further amended at hearing) has raised in issue the following questions, *viz.*, whether Respondent has, as alleged, in violation of Section 8(a)(5) and/or (1):

1. On or about October 11, 1977, without prior notification to, or consultation with the Union, unilaterally instituted a new policy with respect to paid lunch periods, which new policy has resulted in a change in the number of employees theretofore entitled to a paid lunch period.[3]

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3. It is observed such alleged unilateral conduct occurred during the pendency of the "Employer's Exceptions to Regional Director's Report on Objections" before the Board, discussed *infra*.

2. Commencing February 22, refused to meet and bargain with the Union as the certified bargaining representative of its employees in the above appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment; and commencing March 22, refused to furnish to the Union data relating to the wages, fringe benefits, job classification, hiring dat and home addresses of all employees of the Respondent in the said unit.

3. (a) By foreman Val Kaminski [sic], during March 15 to 20, the exact date being unknown, informed an employee that Respondent would never recognize or bargain with the Union.

(b) By Vice President William Scheffield [sic] on or about March 16 or 17, and again on May 14, interrogated an employee concerning his union activities, sympathies, membership and/or affiliation of other employees.

(c) By letter of President Samuel H. Smith, Jr., informed employees that Respondent would not bargain with the Union until the federal courts have determined whether the Representation election was a fair one.

4. Refused to bargain in or about June, the exact date being unknown, by unilaterally implementing at Strongsville a new absenteeism control program based on a point system without prior notification to or consultation with the Union.

5. On or about August 18, unlawfully refused a request of individual charging party Vale for union representation at an interview and/or meeting which Vale reasonably believed would result in adverse action in connection with the terms and conditions of his employment and/or would result in his being subject to adverse dis-

ciplinary action; and at the end of said interview/meeting unlawfully suspended Vale; or whether Respondent did not violate Section 8(a)(1) in any of the above respects by virtue of the request being made by Vale at the end of the meeting as contracontended by Respondent, apart from other contention.

In the latter respect it may be further preliminarily observed that with the exception of the issues presented by questions 3(a) and 3(b) *supra, all* the other issues presented in the above questions appear to involve the underlying representation case issue of whether Respondent during material times was obligated to recognize and bargain with the Union herein by virtue of the Union having been earlier lawfully designated by the majority of the employees in the above described appropriate unit, as evidenced by the results of the election conducted on April 22, 1977 and subsequent certification by the Board as the collective-bargaining representative of such employees. Thus the same said issues would appear to be affected either directly or indirectly by Respondent's basic contentions pursued heretofore before the Board, and continued in this proceeding and in Respondent's brief, *viz.*, that the employees have not in fact designated Charging Party Union as their collective-bargaining representative in a validly conducted and fair election; and that accordingly the Board's prior certification was not proper and legal. Involved as a basic issue is thus the usual or so-called "test of certification" issue, with, however, one seemingly notable exception. Thus the Regional Director in finding the Employer's previously filed "Objections to Conduct of the Election and Objections to Conduct Affecting the Results of the Election" were all without merit noted in regard to Objection 8 thereof that certain ". . . discrepancies in the rates quoted by the Petitioner arguably can be found

to be misrepresentations but cannot conceivably be considered a forgery or an improper involvement of the Board or its processes." Applying the current Board policy on election misrepresentation as then contained in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, decided April 8, 1977, the Regional Director found Objection 8 to be without merit, a finding excepted to by the Employer, but subsequently on essential holding adopted by the Board.[4] As the Board has since its review of the Regional Director's Report on Objections and Employer's Exceptions thereto and subsequent to its Certification of the Union through application of its *Shopping Kart* principle, *supra*, subsequently announced return to a policy of review of claims of substantial misrepresentations in accordance with its doctrine as contained in *General Knit of California*, 239 NLRB No. 101, and that of its forbear *Hollywood Ceramics Co.*, 140 NLRB 221, further issues are raised herein as to the effects of same, if any, in this unfair labor practice proceeding. Thus the Board's return to its basic *Hollywood Ceramics Co.* doctrine, *supra*, would appear to raise as subordinate issues, *inter alia*, questions whether such current policy should find application in this unfair labor practice proceeding;[5] whether such issue is properly addressable by an Administrative Law Judge in the circumstances of this case's development; and whether the contended misrepre-

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4. In *Shopping Kart*, *supra*, the Board announced that it would no longer inquire into the truth or falsity of representation election campaign statements and would henceforth not set aside elections on the basis of misleading campaign statements.

5. It is observed the Stipulation for Certification Upon Consent Election Agreement was entered by the parties and approved by the Regional Director prior to the advent of *Shopping Kart*, *supra*, but the election, Employer's Objections, Employer's Exceptions and the Board's review and Certification itself, was accomplished during the tenure of the *Shopping Kart*, rationale. Additionally it is observed the underlying representation case proceeding in Case No. 8-RC-10830 has not heretofore been consolidated in the instant proceeding.

sentations constituted substantial misrepresentations and were of an order warranting the conclusion that the underlying representation case election was not one valid and proper as has been continuously contended by Employer, and is one which the Board in application of its current policy would now order set aside.[6]

C. *The Evidence*

1. The alleged unilateral changes.

a. *In regard to paid lunch periods.*

The complaint alleges and General Counsel contends that on or about October 7, 1977, thus while Employer's Exceptions to Regional Director's Report on Objections were pending before the Board that Respondent in violation of Section 8(a)(5) and (1) unilaterally changed certain

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6. Preliminarily I observe that on the basis of Board precedent set forth, *infra,* I have no hesitancy in reaching conclusion that the Board would have its current policy on election misrepresentations as set forth in *General Knit, supra,* applied to the related 8(a)(5) and (1) issues in this proceeding. Seemingly less clear is the resolution of the question whether I have authority to do so where the Board has heretofore issued prior certification of the Union, albeit on (now) contrary and overruled precedent. In that connection I find no directing precedent from my own review of cases processed post *General Knit, supra,* involving *General Knit* misrepresentation issues, which review reveals that such issues appear heretofore to have been raised before the Board either *sua sponte,* or directly with the Board by General Counsel's motion for summary judgment, or in some extension of the pertinent representation case proceeding. Nonetheless, the issue is before me, and on the basis of other Board precedent and analogous reasoning set forth *infra* I am also led inexorably to conclude that I am directed and expected by the Board to apply its current and controlling precedent in the disposition of the 8(a)(5) and (1) issues herein. However, in the event the Board may not agree with the appropriateness of such analogy or with certain conclusions of law which I resultingly have reached herein, I shall address and resolve the factual issues material to all the allegations of the complaint herein.

existing terms of employment of employees in that Respondent at that time instituted, without notification to, or consultation with the Union, a new policy with respect to paid lunch periods, which has resulted in a change in the number of employees who might be entitled to a paid lunch. Respondent defends firstly that it was under no obligation to bargain with the Union; and alternatively affirmatively defends that the Union never requested the Employer to bargain over the change in lunch period policy, and that in any event that its action in that regard was a permissible one since taken out of business necessity.

The facts relating to this allegation are essentially not in dispute. Thus at hearing the parties stipulated that on October 7, 1977 the Respondent instituted a new policy with respect to paid lunch periods; that this change was instituted by Respondent due to business *necessity;* and that the aforesaid change has resulted in a change in the number of employees who might be entitled to a paid lunch period. Indeed the parties have stipulated as to the specific names, departments and shifts of some 35 employees identified as presently affected thereby. The Complaint also alleged and Respondent has admitted in Answer that it effected such change without prior notification or consultation with the Union. The General Counsel further established through uncontested and credited testimony of the Union's Business Representative, Clarence Davis, Jr., that the Union had never waived its right to bargain on this subject.

The General Counsel concedes that the 8(a)(5) question raised must be resolved on the fundamental determinations of whether the Company had a duty to bargain with the Union at the time of its unilateral action; but also whether the circumstance of Employer's business necessity, uncontested (stipulated) by General Counsel, may con-

stitute a defense to Employer's refusal to bargain with the Union over the matter. General Counsel's evidence of the Board's certification of the Union is *prima facie* evidence that the Union occupied a designated majority status as a result of the election conducted prior to Employer's unilateral action in October, 1977. The General Counsel also correctly observes that there can be no question that the paid lunch period here involved is a bargainable condition of employment, *George Webel d/b/a Webel Feed Mills & Pike Transit Company,* 217 NLRB 815, 820. It is well settled that an employer may not during negotiations make unilateral changes in working conditions of employment without first affording the employees' statutory bargaining representative an opportunity to bargain collectively thereon. The Supreme Court has thus held that such unilateral action by an employer without prior discussion with the Union does amount to a refusal to negotiate about the affected conditions of employment under negotiation and ". . . must of necessity obstruct bargaining, contrary to congressional policy.", *N.L.R.B. v. Katz, Benne, etc., d/b/a Williamsburg Steel Products Co.,* 369 U.S. 736, 747 (1962). However, such holding did ". . . not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, . . ." id. @ 748.

In support of their respective contentions in regard to Employer's above unilateral actions, both parties, though from different vantage points of same, seek to rely on the Board holding in *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., etc.,* 209 NLRB 701, 703-4 (1974).[7] Addressing the matter of unilateral actions taken by an employer during pendency of Objections the Board there noted:

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7. Reversed on other grounds. 8th Cir., 512 F.2d 684 (1975).

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made.[10] And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes.[11] Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. Accordingly, since we have already determined in this case that the Union should be certified, we find, contrary to the Administrative Law Judge, that Respondent was not free to make changes in terms and conditions of employment during the pendency of postelection objections and challenges without first consulting with the Union.

* * * * *

10. *King Radio Corporation, Inc.*, 166 NLRB 649, 652; *Laney & Duke Storage Warehouse Co., Inc.*, 151 NLRB 248, 266-67, enfd. in relevant part 369 F.2d 859, 869 (C.A. 5, 1966); *Zelrich Company*, 144 NLRB 1381, enfd. 344 F.2d 1011 (C.A. 5, 1965).

11. *Keystone Casing Supply, Inc.*, 196 NLRB 920; *King Radio Corporation, Inc., supra; General Electric Company*, 163 NLRB 198, enfd. in relevant part 400 F.2d 713 (C.A. 5, 1968); *Zelrich Company, supra; Fleming Manufacturing Company, Inc.*, 119 NLRB 452.

* * * * *

Respondent thus contends that established Board precedent permits an employer to make a unilateral change during pendency of Objections if the employer makes showing that "compelling economic considerations" existed for effecting the change at the time. Respondent defends that the change in its paid lunch period, though concededly made unilaterally during the pendency of its objections, was one which was justified by existing "business necessity," a fact stipulated by General Counsel. Respondent argues that there was thus no question but that the change effected was one absolutely necessary for the business of the Company. Given that uncontested circumstance, the Respondent contends that it has not violated Section 8(a)(5) and (1) by effecting the change in its paid lunch period, relying on *Mike O'Connor Chevrolet, supra.*

General Counsel counters that when an Employer has been put on notice of a union's designation as the collective-bargaining representative, as Employer was here by virtue of the earlier election results, whether the Employer's unilateral action during the pendency of Objections is lawfully motivated or not, the Employer is deemed to have acted at its peril, and upon subsequent certification of the Union, the Employer is concluded to have engaged in conduct violative of Section 8(a)(5) and (1), also relying on *Mike O'Connor Chevrolet, supra,* and *W. R. Grace & Co.,* 230 NLRB 617. General Counsel essentially argues that Respondent's reliance on economic (or business) necessity is neither a viable defense thereto, nor a sufficient rebuttal thereof, *Master Slack and/or Master Trousers Corp.,* 230 NLRB 1054 (citing *Fleming Manufacturing Co.,* 119 NLRB 452, 465). However, I am constrained to conclude that the General Counsel's contentions are not wholly persuasive.

The weakness in General Counsel's position appears to me to be that it does not take sufficiently into account the

Board's indicated exemption of changes based on "compelling economic considerations" occurring during the period of pendency of Objections, nor appear to acknowledge the fair import of General Counsel's concession that a condition of "business necessity" was operative on Employer at the time. As I construe the Board's holding in *Mike O'Connor Chevrolet, supra,* an employer acting unilaterally but within the framework of established "compelling economic considerations," will not be deemed to have acted at its peril (unlawfully), even should the Union be subsequently certified. It seems warranted to especially note that the nature of the exemption by the Board under the *Mike O'Connor Chevrolet* case holding is a narrow one, being limited to unilateral action undertaken because of "compelling economic considerations." It does not extend to other unilateral actions of any lesser (noncompelled) nature, e.g., to those changes that might be undertaken in such period by an employer prompted solely by business or economic expediency, or for some advantageous or opportune business reason, albeit in accordance with otherwise unquestionable good business judgment, practice or procedure. Thus, even if such be unaccompanied by any unlawful motivation, they all appear to carry[8] with them those considerations noted by the Board as defeative of the principle of collective bargaining; and being not compelled by economic reason, an employer electing to pursue same, acts at its peril in doing so. Nor, in my view, does General Counsel's position taken in this matter allow for the fair import of a conceded "business necessity" as reasonably to be construed as encompassing "compelling economic con-

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8. For this reason, *Master Slack and/or Master Trousers, Corp., supra,* and other similar such cases cited *supra,* appear to fall in the latter category of cases on their facts involving noncompelling business or economic considerations; and such cases are deemed not to be dispositive or controlling of this issue.

sideration.s." Rather, I am persuaded and conclude that it does.[9] General Counsel does not contest that the circumstances prompting Respondent's change in its paid lunch period policy were based on a "business necessity," indeed acknowledged and stipulated that to have been the fact. As I have concluded such "business necessity" is reasonably to be viewed as encompassing "compelling economic considerations," it follows therefrom, and wholly apart from efficacy of any other Employer contentions, e.g. bearing on the validity of the Union's certification, that the instant complaint allegation that the Employer has acted unilaterally in derogation of Section 8(a)(5) and (1) in changing its paid lunch period, is without merit, *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, etc., *supra*. Additionally it is observed that although the burden of establishing that Employer's action was taken for "compelling economic considerations," being the latter constituted an affirmative defense, was properly that of the Employer (and I conclude sufficiently met), the ultimate burden of establishing that the Employer's unilateral conduct was violative of Section 8(a)(5) and (1) remained that of the General Counsel. I conclude and find the General Counsel has failed to meet his burden in regard to Employer's decision to change its paid lunch policy.[10] Thus, given Gen-

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9. Law and English Dictionary usage of the word "necessity" reveals a common thread of that which in nature is compelling, e.g., of controlling force, irresistible compulsion; inevitable; unavoidable; a condition arising out of circumstances that compels a certain course of action; that which makes the contrary of a thing impossible; or a power or impulse so great that it admits of no (other) choice of conduct. Cf. *Black's Law Dictionary Fifth Ed.*, page 929 (1979); and *Webster's New Collegiate Dictionary*, page 767 (1977).

10. In the view I have taken of the Board's holding in *Mike O'Connor Chevrolet, supra*, the case holding is both one of a limited exemption but controlling on the circumstances presented

(Continued on following page)

eral Counsel's concession that Respondent's change in paid lunch periods was accomplished for compelling economic considerations, there would appear to have been no duty on the Respondent to consult initially with the Union about its decision to change the paid lunch periods during the pendency of its objections. To conclude otherwise would appear to me to effectively delete any operativeness of the phrase "absent compelling economic considerations" as set forth in the Board's basic holding in *Mike O'Connor Chevrolet, supra.* Accordingly, in that respect, the aforesaid complaint allegation is concluded to be without merit; and it will be recommended that it be dismissed. However, it would appear that General Counsel in his expressed reliance on *W. R. Grace & Co., supra,* fares much better. Thus, in the latter case the Board has held, in agreement with General Counsel's contention in that regard, that an employer does have an obligation to bargain with a subsequently certified union, e.g., about the effects of an earlier decision of the employer to cease a plant operation, lay off employees and change work schedules, arrived at and implemented during pendency of employer's objections. To be sure, the original decision of the employer to unilaterally act in those respects was not violative of the Act; and it was based on a legitimate business reason not revealed as otherwise being also of compelling economic consideration. However, the Board has similarly concluded and held that an employer is required to bargain with the Union over the effects of such a decision, and specifically even when the decision be arrived at in circumstances of a

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Footnote continued—

in the instant matter. Employer would also rely on *Schien Body and Equipment Co., Inc.,* 216 NLRB 110 (1975) and *Sundstrand Heat Transfer, Inc.,* 221 NLRB 544. However, although these cases present questions on an employer's certain unilateral acts undertaken during the pendency of Objections, they each appear inapposite on their facts to the case situation presented herein.

seemingly more compelling economic origin. Cf. *Stagg Zipper Corp.*, 222 NLRB 1249 (1976). See and compare also *Burroughs Corporation,* 214 NLRB 571, 579-580; *Brockway Motor Trucks, Division of Mack Trucks, Inc.*, 230 NLRB 1002, 1003; and *GM Corp., GMC Truck and Coach Div.*, 191 NLRB 951, 952. Thus, as the Board has not clearly expressed exemption to an employer from required bargaining with a certified union about the effects of such a decision shown to adversely affect bargaining unit employees (or unit work), and as I am unwilling to conclude on the evidence before me, that loss of paid lunches for some thirty or more employees is *de minimis;* and as the Union did not waive any bargaining rights it had therein, it appears that Respondent is to be deemed in violation of Section 8(a)(5) in failing to bargain with the certified union over the effects of its unilateral change in the paid lunch policy of certain employees, absent some other excusing consideration for such failure to bargain being successfully advanced by Respondent.

2. The Refusal to Meet and Bargain; and the Refusal to Supply Requested Data.

a. *General Counsel's prima facie case.*

The basic facts respecting these allegations appear to be essentially not in dispute. As noted, the Union was certified by the Board on January 17. It was stipulated by the parties that commencing on or about February 22 the Union has requested and the Respondent has refused to meet and bargain with the Union with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment. It was further stipulated by the parties that commencing on or about March 7, the Union has requested and the Respondent has refused to furnish the Union data

relating to wages, fringe benefits, job classifications, hiring dates and home addresses of all employees of the Respondent in the above appropriate unit. The complaint of October 11 alleges that Respondent by such actions has violated Sections 8(a)(5) and (1) of the Act. Essentially the Respondent defends that the reason it has refused to furnish data to the Union as requested is because of its belief that the election, which was a close one, was invalid for the reasons it had asserted previously in its Objections and because it has intended to pursue those election objections further and to test the Union's certification.

At hearing the General Counsel offered in evidence, *inter alia,* the Employer's Objections together with the material evidence heretofore submitted by the Company in support of its (8) Objections, and on which Respondent would presently continue to rely. Thus at hearing, David C. Bragg, Director, Employee Relations at Van Dorn Company, testified that the Respondent has refused to bargain with the Union essentially because of the reasons set forth previously in Employer's Objections; but also specifically because of a certain 3-page letter (referred to by him as the Nelson Stud Welding Letter) which was distributed by the Union and which relates to Respondent's Objection 8.

Respondent acknowledged at hearing that it was not seeking to introduce any additional evidence in this proceeding in support of its Objections which was not previously considered by the Board. On General Counsel's placement of objection, relitigation of all Objections was precluded at hearing. Respondent apparently for the first time in this proceeding has contended that the Board has improperly failed to hold any hearing without providing the Employer with an opportunity to see the materials, if any, submitted by the Union (during the investigation of

the Objections) and without affording the Employer the opportunity to examine or cross-examine the persons resible for the conduct resulting in its Objections to the election. In any event, the Board and the Courts have consistently held that issues which were raised or which could have been raised and thus timely determined by the Board in a prior representation proceeding cannot be relitigated in the subsequent unfair labor practice proceeding, absent additional evidence which is in nature newly discovered or previously unavailable; or unless claim of special circumstances is raised and established in the case.[11] All the issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and as noted, Respondent did not offer to adduce at this hearing any newly-discovered or previously unavailable evidence, nor has it urged any special circumstance exists which would require the Board to reexamine the decision made in the representation proceeding with the apparent exception of its contention now raised in brief for an application of the Board's current law on the alleged misrepresentations earlier raised in its Objection 8, which is a claim to be considered *infra*.

The Board's prior review of a party's Exceptions is binding on the administrative law judge, cf. *M. N. Landau*, 175 NLRB 337, 338; and the latter has no authority to review the Board's final disposition of representation issues or to question its conclusions made on an existing record, *LTV Electrosystems, Inc.*, 166 NLRB 938, 940, enf'd. 338 F.

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11. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); *N.L.R.B. v. Certified Testing Laboratories, Inc.*, 387 F.2d 275 (3rd Cir. 1967), enfg., 149 NLRB 881; *Bokum Resources Corporation*, 245 NLRB No. 84; *Wentworth Institute and College of Technology, Inc.*, 210 NLRB 345 (1974); *The Hertz Corporation*, 190 NLRB 665 (1971); and Rules and Regulations of the National Labor Relations Board, Sections 102.67(f) and 102.69(c).

2d 683 (4th Cir. 1968). Further, no question appears raised by Respondent that its denial of the above information upon request of a properly certified union would constitute a denial of information necessary and relevant to an effective discharge by the Union of its statutory function as certified collective-bargaining representatives, and that the denial of same would thus constitute a separate violation of Section 8(a)(5).[12] Accordingly, General Counsel having shown the Union to have been heretofore certified by the Board, and having established as well that there has been a subsequent request by the Union for, and refusal by the Respondent to commence bargaining and to provide requested data material to bargaining, the General Counsel has in each respect established a *prima facie* case of violation of Section 8(a)(5) and (1), cf. *Williams Energy Company*, 218 NLRB 1080; *The Cross Company*, 127 NLRB 691, 700; *International Credit Service, etc., supra; Rod-Ric Corporation, supra.*

b. *The Issues Raised by the Board's Post-Certification Change of Law Applicable to Election Misrepresentation.*

Respondent had *inter alia*, initially urged that the election held in the underlying representation case proceeding was not a fair one, contending that it was tainted by instances of campaign misconduct by the Union and by employees acting on behalf of the Union. More specifically, Respondent had contended that there has been "forgery, fraud and misrepresentation" by the Union in that: "On a crucial issue of comparative pay, the Union had produced and distributed, at a time when the Employer could make

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12. *International Credit Service, etc.*, 240 NLRB No. 102; *Preterm, Inc.*, 240 NLRB No. 81; *Richmond Division of Pak Well*, 206 NLRB 260.

no effective reply, a totally fabricated set of wage rates." Employer asserts that these rates were reproduced among a "collage" of paragraphs supposedly photocopied from an actual District 54 labor agreement. All these contentions *were* previously raised before the Regional Director. As earlier noted, the alleged misrepresentations as objectionable grounds were found to be without merit by the Regional Director on the basis of then current Board precedent as contained in *Shopping Kart Food Market, Inc.*, 228 NLRB 1331 (1977), under which the Board would no longer construe misrepresentations (not involving forgery or Board processes) as grounds for objection to election.

The Respondent has now urged for the first time in its brief a second base or reason in support of its contention that the Union's status as certified collective-bargaining agent should be reconsidered in this proceeding, *viz.*, that the Board's decision in the representation case was clearly based upon a "now discredited *Shopping Kart* rationale," which had overturned *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), and which itself has now (in the interim since hearing) been overturned by the Board in *General Knit of California*, 239 NLRB No. 101 (1978); and that *General Knit*, has announced the Board's return to its standard of misrepresentations as grounds for objection to election as earlier set forth in *Hollywood Ceramics Company, Inc., supra.* Thus Respondent contends that application of *Hollywood Ceramics*, standard to the underlying representation proceeding, is now called for by current Board law as continued in *General Knit, supra;* and Respondent contends that *General Knit* warrants a reconsideration by the Board in this proceeding of the question whether the Union's earlier misrepresentations "may reasonably be expected to have a significant impact on the election." Respondent in its brief, has further argued

that the Regional Director and the Board have already found that misrepresentations had occurred which would have rendered the election invalid under the *Hollywood Ceramics* standard. Respondent thus argues that with the return of the Board to that rule, there is now no evidence in this case, other than an election readily to be observed as one invalid under *current* Board law, to show that the Union is now or ever was the majority choice of Respondent's employees as designated in a fair election. Finally, it is Respondent's position that not only does the above establish that the Employer has not violated Section 8(a)(5) and (1) by refusing to bargain with the Union, or to supply the requested information to it; it also follows the Company did not (in any event) violate the Act in connection with its earlier conduct in regard to lunch period discussed *supra*, or later conduct in regard to attendance control policy, discussed *infra*, nor under any view of the circumstances in regard to the alleged 8(a)(1) disallowance of a union representative's presence during employee Vale's interview, discussed *infra*. Unfortunately, General Counsel's otherwise encompassing brief does not address the effect to be had, if any, in this proceeding of the Board's post-certification reversal of the *Shopping Kart* rationale which unquestionably controlled the disposition of the alleged misrepresentations objection 8 in the underlying representation proceeding, and the effect on that certification, if any, of *General Knit's* reinstitution of the *Hollywood Ceramics* standard in regard to the issue of substantial misrepresentations that may have affected the results of election on the basis of which the Union clearly has been earlier certified.

In my view, the issues to be addressed are thus threefold, *viz.*: (1) What Board law on the subject of the alleged misrepresentations is to be now applied in the

circumstances of this unfair labor practice proceeding? (2) Assuming current Board precedent as contained in *General Knit, supra,* is to be applied, does an administrative law judge have standing, in determining the issues before him, *viz.,* whether there has been any violation of Section 8(a)(5) as alleged in complaint, to in effect address the efficacy of the certification, in these seemingly unique circumstances,[13] by considering issues of misrepresentation previously raised before the Board and determined, but under a *different standard's* application which is clearly no longer established Board law governing such matters? (3) If so, did the Union's subject flyer contain substantial misrepresentations affecting results of the election within the purview of the current *General Knit* (i.e. *Hollywood Ceramics*) standard, and subordinately, may such issue be resolved as a matter of law on the Exhibits and facts already found in the underlying representation proceeding, or must further hearing be held to resolve any (formerly irrelevant, but now material) disputed fact bearing thereon? There having been no prior hearing on Respondent's factual assertions, it would appear, any finding that the alleged misrepresentations were not substantial must be on an evaluation made on the basis that all the material factual assertions raised by Respondent are true.

It is concluded the first question whether current Board law is applicable to the instant proceedings, is to be clearly answered in the affirmative. Thus, in a variety of approaches to this issue, the Board has made clear that it would have its current law on misrepresentations find

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13. I have earlier noted the cases in which such issue has arisen appear to show heretofore normal resolution in an extension of the representation proceeding or directly by the Board via a General Counsel's motion for summary judgment.

application to 8(a)(5) issues such as are raised in this proceeding, dependent as they are directly on the efficacy of the underlying representation election and resulting certification proceedings.[14] I further conclude that an administrative law judge does have authority under existing Board precedent to reach the subject issues. Thus while the administrative law judge is bound by the Board's conclusions, and final dispositions of representation issues, and has no authority to question the Board's conclusions made on a prior existing record,[15] this does not mean that the Board would thereby have its administrative law judges hamstrung from any addressment of evidence of legitimate factual changes potentially affecting either the unit or its prior certification, if that evidence is shown to be excusably not part of that existing record which the Board has earlier reviewed. To the contrary, the Board has long provided for the receipt, consideration and evaluation of newly discovered evidence, evidence not previously available, and evidence in support of appropriately raised claim that special circumstances have arisen such as would clearly warrant the Board itself to reconsider its prior determinations made in the underlying representation matter. What is precluded is any relitigation, and indeed, presumptuous review by an administrative law judge of the Board of matters which were already litigated or could have been litigated in the existing record and

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14. *Rex Hyde, Incorporated*, 241 NLRB No. 168 (on Motion for Summary Judgment); *Jamak, Inc.*, 239 NLRB No. 194 (extension of representation proceedings); *National Counsel of Young Israel, d/b/a Shalom Nursing Home*, 241 NLRB No. 9 (joined proceedings); *San Francisco Hosts, Inc.*, 241 NLRB No. 53; *Blackman-Uhler Chemical Division—Synalloy Corporation*, 239 NLRB No. 102. See also *The Standard Register Company*, 246 NLRB No. 54 (1979).

15. *LTV Electronics, Inc., supra, M. N. Landau, supra.* See also *Manufacturing Company*, 239 NLRB No. 9.

which the Board has already fully considered and determined on the basis of that existing record. It is not open to question that an administrative law judge is to consider new evidence, indeed, has been directed and is expected by the Board to consider same. Thus, the Board has clearly held in regard to raised question of continued appropriateness of a unit, that the administrative law judge should receive subsequent documentary evidence bearing on the continued appropriateness of a unit *and* consider it, even following a prior Board determination of that unit, *S. S. Kresge,* 169 NLRB 442, 443 (1968) mod. on other grounds 416 F.2d 1225 (6th Cir. 1969). See also *Frito Lay, Inc.,* 177 NLRB 820 (1969); and on the Board's indicated treatment of special circumstances if promptly raised, *Sohio Petroleum Co., A Division of Sohio Natural Resources Co.,* 239 NLRB No. 33. In the latter respect, claim that special circumstances exist must be based on matters not previously raised before the Board and be such as would require the Board to reexamine the decision earlier made in the representation proceeding, *Reichart Furniture Co.,* 238 NLRB No. 213. However, the Board itself has also had occasion to point out that its prior decision must be viewed as testing actions and events in the time frame of circumstances and relations existing at the time of the Board's decision, *Bay Medical Center, Inc.,* 239 NLRB No. 94. To be sure, it may fairly be observed that the above clear precedent [sic] are directed at factual changes bearing on unit or certification *vis a vis,* e.g., application of law. However, the Board has held equally clearly that it is the responsibility of an administrative law judge to apply existing Board precedent, not reversed by the Board or the Supreme Court, *Ford Motor Company (Chicago Stamping Plant),* 230 NLRB 716, 718, fn. 12 (1977). But here it will be observed the Board *has* overruled the very precedent

that was operative and controlling of the underlying representation case of which this proceeding in these very respects is but an extension; and furthermore, it is perfectly clear from existing Board precedent since decided, that the Board directs its current policy on election misrepresentation be applied to all current cases pending before it, including those in which a prior certification may have heretofore issued under the now overruled *Shopping Kart, rationale,* of which the instant case is unquestionably one. It is clearly discernible that the Board has never heretofore applied its current *General Knit* holding in the underlying representation case. It thus appears to me that it would be an anomaly in these unique circumstances for post-certification factual changes to be addressable by an administrative law judge, but the effect of the Board's interim overruling of prior controlling precedent not so, particularly given the direction of the Board otherwise that the administrative law judge is to follow its current precedent. I thus conclude that whether Respondent's contention in regard to the latter matter is one to be viewed as authorized for consideration by virtue of being within the category of a raised special circumstances, or is one authorized for review simply by virtue of the Board's reversal of its prior controlling precedent and its standing direction that the administrative law judge apply its current precedent, the Respondent's contention for application of *General Knit,* is one properly raised for consideration and evaluation in the resolution of the instant complaint allegations, and consequently I have standing, indeed am directed and expected to apply the current Board law, as the Board would do under its current precedent. However, in any assessment and evaluation of alleged misrepresentation, all circumstances must be considered on the question whether a given misrepresentation constituted

a substantial departure from the truth which may reasonably have been expected to have had a significant impact on the results of the election, under the standard set forth in *Hollywood Ceramics, supra,* cf. *San Francisco Hosts, Inc., supra; Cadillac Evening News,* 244 NLRB No. 83; though by virtue of findings in a prior representation proceeding and the governing nature of Exhibits, only a question of law (legal conclusion) may be resultingly presented, *Westinghouse Electric Corporation,* 240 NLRB No. 106. See also, *Huntsville Manufacturing Company, a Division of M. Lowenstein & Sons, Inc.,* 240 NLRB No. 172, footnote 1.

c. *The facts in regard to Objection 8 alleged misrepresentation.*

Objection 8, as filed by the Employer provided in its entirety:

> 8. On the day of the election, the Union distributed a flyer containing what purported to be a copy of one of the Union's contracts, containing provisions for wage rates for various job classifications, pension and premium pay. A copy of the flyer is attached hereto as Exhibit B. In fact, such 'contract' was a forgery in that there are no fixed wage rates contained in the actual contract, and there are no provisions for set-up, leadman, or instructional premiums. A copy of the actual contract, obtained by the Company subsequent to the election, is attached hereto as Exhibit C. See also, the statement of J. Brian Gallagher, attached hereto as Exhibit D.

The flyer, in evidence, is initially observed to be composed of three pages, the first and third of which are deemed material herein. The first page was in form a

letter addressed to Van Dorn Employees and clearly identified as being from the Union, *viz.*, International Association of Machinists and Aerospace Workers, District 54. The letter makes initial reference to an earlier Van Dorn pamphlet which the employees had recently received, with assertion made by the Union generally that the pamphlet had ". . . distorted and twisted the truth." The Union's letter went on to specify:

B. The plant that was supposed to have I.A.M. negotiated rates show no location or identification of area rates.

C. Van Dorn wage and benefits were duplications of the one given out in 1974 with no improvements.

D. Van Dorn profits have increased immensely since 1974.

As a result of many misstatements and omissions we have decided to fill in the spaces left vacant by the Company. I have attached some rates and language from one *of our* I.A.M. & A.W. contracts (sic) these rates are in effect until April 30th, when a new *contract* will be negotiated. . . (Italics in original).

The third page of the flyer is an apparent collage of the above referenced "some rates and language." The third page begins with language in form a contractual preamble and identifies "Nelson Stud Welding Company" as the Employer and also makes reference to the other (union) party as being the ". . . International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge— ts affiliated Local Lodges signatory to this Agreement. . ."(A pension trust fund reference insert was diagonally added so as to clearly indicate addition, but also in such manner that it obliterated and thus prevented

identification of the actually involved District Lodge Number.) The third page also listed some fourteen individual classifications and their purported respective rates, spanning from a low of $6.91 for a shop janitor to $10.78 for tool and diemaker classification. The third page also referenced a "Section 8. Pay for Setup Men, Leadman, Instructors"; and appearing immediately thereafter, a further reference to a "Section 3. Study of Job Evaluation for Manufacturing Concerns":

The evidence offered by the Employer in support of its Objection 8 consisted of attachment of a copy of a contract between "Nelson Division of TRW, Inc." and "International Association of Machinists & Aerospace Workers, District Lodge No. 139, and its Local Lodge No. 1539"; and claim of wage and premium discrepancies between the flyer and the contract as purportedly reported in a telephone conversation by Dan Bender, Supervisor Industrial Relations for the Nelson Division of T.R.W. (Nelson Stud Welding) to J. Brian Gallagher, Respondent's Employee Relations Supervisor. Notably, however, Bender had also reported to Gallagher that he was not familiar with the verbiage in the letter or the corresponding section numbers.

Insofar as pertinent to the matter of misrepresentation presently being considered, the Regional Director found:

> Investigation reveals that on or about April 19, the Petitioner distributed a flier to the Employer's employees which contained, among other things, a page of selected contract language including a section dealing with pay for setup men, leadmen and instructors, a section covering job evaluation, as well as a list of 14 job classifications with an hourly rate beside each job classification. Contrary to the Employer's

contention, the material in the flier was excerpted from a multi-employer contract between a district of the Petitioner in the San Francisco Bay area and a Bay area employer rather than from a contract between the Petitioner and a Northern Ohio employer. The first paragraph on the page identifies the parties to the agreement. The Employer designated in the flier and the firm of the same name relied upon by the Employer are both subsidiaries of a larger parent corporation located in Cleveland, Ohio. Two of the job classifications listed do not exist at the particular Bay area plant involved but are listed because they exist at other Bay area employers covered by the agreement. In addition, there are discrepancies ranging between 11 cents and 30 cents in the rates quoted in the flier and the rates, including cost of living, at the plant as of April 1, 1977.

Recently, the Board in *Shopping Kart Food Market*, 228 NLRB No. 190, in overruling *Hollywood Ceramics Co.*, 140 NLRB 221, announced that it would no longer inquire into the truth or falsity of representation election campaign statements and would henceforth not set aside elections on the basis of misleading campaign statements. The Board stated that:

> . . . Board intervention will continue to occur in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is.

The discrepancies in the rates quoted by the Petitioner arguably can be found to be misrepresentations but cannot conceivably be considered a for-

gery or an improper involvement of the Board or its processes.[16]

* * * * *

Inasmuch as misrepresentations, of the type involved here are no longer objectionable under current Board law, I find that Objection No. 8 is without merit. Accordingly, I shall recommend that Objection No. 8 be overruled.

As earlier noted, the Employer excepted, *inter alia,* to the Regional Director's overruling of its Objection No. 8 and moved the Board to sustain Objection 8 and order a new election. The Employer in such Exceptions in regard to misrepresentations there urged and preserved its position as follows:

On the day of the election, the Union distributed a flyer containing a page which purported to contain rates and language 'from one *of our* I.A.M. & A.W. contracts.' In fact, the contract was not one of the Union's contracts, but rather it was from another district lodge (in California). That fact was cleverly concealed by the Union through the device of superimposing a pension provision in such a way as to obscure the identity of the district lodge, but not to obscure the name of the employer, which was the same as that of a local firm. Further, although *certain* pro-

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16. The evidence offered in support of Respondent's forgery contentions, was thus duly considered previously (i.e., under *Shopping Kart, supra*) and found deficient. It would therefore appear it is not affected by the Board's return to Hollywood Ceramics, rationale in regard to misrepresentations. Consequently, to the extent forgery contentions may appear to be continued to be pressed by the Respondent herein, such are deemed to be matters which were fully litigated or could have been litigated in the earlier proceeding; and that consideration as an objectionable ground is deemed one not further litigable in this proceeding.

visions are accurate copies of what is in the California contract, so as to create the impression that *all* provisions are 'Xeroxed' from the California contract, the rate provision was completely falsified. Thus the wage rate provision included fictitious job classifications having high rates; it did not include the lower rates for various 'helper' classifications; the rates were approximately $2.00 per hour higher than the rates specified in the California contract; the rates included cost-of-living allowances and shift premiums; and, even with all those impermissible additions to the California rates, those rates were still lower than those set forth in the flyer.

In overruling this objection, the Regional Director decided that the flyer was a material misrepresentation under *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), but that 'misrepresentations, of the type involved here, are no longer objectionable under current Board law' because the flyer did not purport to be a *full* copy of a District 54 contract, but merely a collection of excerpts which have been juxtaposed for convenience.

It is the position of the Company that the flyer indeed *purports* to be a collection of *actual* excerpts juxtaposed for convenience and that it is *really* a collection of *fabricated* excerpts. Thus, the flyer is objectionable under both pre-*Hollywood Ceramics* cases, *Hollywood Ceramics* itself, and *Shopping Kart Food Market*, 228 NLRB No. 190 (1977). It is campaign trickery of the basest sort, focusing upon wages—the key to any election campaign. It is forgery. It is misrepresentation. The employees (and even the Company) had no way of discerning that the flyer

contained a forged section of rates, or that it did not relate to a District Lodge 54 contract, and thus had no way of recognizing the false provision for what it was.

The Employer contends that the foregoing misrepresentations violated pre-*Hollywood Ceramics*, standard itself. In the former regard the Employer has relied on *The Cleveland Trencher Company*, 130 NLRB 600, 603 (1961), (where, *inter alia* the union had impermissibly misrepresented a cost-of-living factor by only a few cents); *The Calidyne Company*, 117 NLRB 1026 (1957), (where a union flyer listed single wage rate for each job classification at another plant already organized by the Union, where in fact there were rate ranges for each classification; and *N.L.R.B. v. Houston Chronicle Publishing Co.*, 300 F.2d 273 (5th Cir. 1962), (where the Court reversed the Board, and held that a union, which had superior knowledge, had misrepresented by adding fringe benefits and premiums to base wages, as Employer claimed the Union has impermissibly done in this instance).

The local (Ohio) contract initially relied upon by Employer is in evidence and reveals it was executed not by District Lodge 54, nor ". . . District Lodge .....ts affiliated Local Lodges signatory to this agreement. . ." but by ". . . District Lodge No. 139 and its Local Lodge No. 1539. . ." Furthermore, it is clear on review of same, that neither the flyer's reported preamble, referenced Sections 8. and 3., nor pension fund provision are to be found in that contract.

The Employer had continued to claim in its Exceptions that the instant flyer was distributed on election day April 22, rather than as generally found by the Regional Director on April 19. However, the Employer, in its exceptions, has acknowledged, and thus effectively admitted

that the contract from which certain of the excerpts did come was (as found by the Regional Director) from a contract "from another District Lodge in California"; conceded further that ". . . *certain* provisions are accurate copies of what is in the California contract. . .," though continuing to contend ". . . the rate provision was completely falsified." In the latter connection it is deemed significant to observe as well that the Union did not itself except to, nor has it heretofore contested the concurrent findings of the Regional Director, *inter alia,* that: "Contrary to the Employer's Contention, the material in the flyer was excerpted from a multi-employer contract between a district of the Petitioner in the San Francisco Bay area and a Bay area employer rather than from a contract between the Petitioner and a Northern Ohio employer."[17]; and

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17. Apart from merit conclusion in regard to any involved degree of inartfulness, the Employer would seem reasonably to have excepted to the Regional Director's conclusion that the California contract was between a "district of the Petitioner" inasmuch as the petitioner in the underlying representation proceeding appears as "District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO", and Employer clearly has premised certain arguments on the fact the California contract was not one to which District Lodge 54 was a signatory. However, in that regard, neither did the first page of the flyer expressly assert the contract to be one negotiated by District 54, but "from one *of our* I.A.M. & A.W. contracts." Both District 54 and District 139 are, of course, equally as well affiliated with the said International. Respondent's argument necessarily is one of implication seemingly based on one meaning or application of the word "our" where other inferential use might as well apply. On the other hand, the first page of the flyer does make the point of contention that the Employer had not earlier identified a purported I.A.M. plant's negotiated rates, which the Union seemingly postured itself as in manner correcting. Additionally it may be observed in respect to Employer's contention based upon failure to list helper rates that such contention would appear to be wholly unpersuasive in that the flyer made reference to presenting only "some rates and language" from the aforesaid contract. It is thus to be observed the handbill in these respects would appear to be susceptible of varied interpretations. However, and in any event, for reasons related *infra,* I need not resolve these aspects of the claimed misrepresentations.

that "In addition, there are discrepancies ranging between 11 cents and 30 cents in the rates quoted in the flier and the rates, *including* cost of living, at the plant as of April 1, 1977" (italics supplied).

As earlier noted, the Board has reviewed heretofore the record in light of the exceptions and briefs, adopted the Regional Director's findings and recommendations, and certified the Union. It would, however, appear further appropriate to note that footnote 2 thereof provided:

> [2]Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977) the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra* and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

The record also reveals that the Union did not except to, nor has it stated any position in opposition to the Regional Director's conclusion that, "The discrepancies in the rates quoted by the Petitioner arguably can be found to be misrepresentations. . ."; and of a type of "no longer objectionable" by virtue of *Shopping Kart, supra.* Respondent's further contentions in that regard are that the Regional Director's decision reveals not only that he concluded there was no merit to Objection 8 solely because of the now overruled *Shopping Kart* rationale, but that the Regional Director, in concluding such were arguable misrepresentations and of a type no longer objectionable misrepresenta-

tions under *Shopping Kart, supra,* concluded that they formerly were; and has thus effectively already concluded and found these rate discrepancies would have constituted objectionable misrepresentations under the *Hollywood Ceramics,* standard. The latter contention would seemingly appear to be not without some argumentative merit but on closer analysis not deemed wholly persuasive. However, even were this so, I reject any further contention by Respondent that the Board has itself already so concluded and/or so found by virtue of its review of the Regional Director's Report and the Board's subsequent certification, cf. *Summa Corporation d/b/a Frontier Hotel,* 242 NLRB No. 76 (1979).

Analysis, Conclusions and Findings

The relevant standard for review of election misrepresentations as initially expressed in *Hollywood Ceramics, supra,* being now reaffirmed by *General Knit, supra,* teaches:

> . . . an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

General Knit, additionally provides:

> . . . employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts *within the special knowledge of the campaigner,* so shortly before the election that there is no effective time for reply.

The significant impact test applied in the above misrepresentation standard is not one of the actual impact it had on voter's choice, but whether the alleged misrepresentations had a tendency to mislead, *Modine Manufacturing Company,* 203 NLRB 527, 531 (1973); *Miller's Pre-Pared Potato Company, Inc.,* 240 NLRB No. 184 (1979).

From earliest days of the application of *Hollywood Ceramics,* the importance of local wages and fringe benefits as an argument for or against unionization has remained unquestioned, *Walgreen Co.,* 140 NLRB 1141, 1143 (1963). Comparisons made in such matters have been consistently recognized by the Board as being of "vital" and "utmost" concern to employees, *Coca-Cola Bottling Company of Louisville,* 150 NLRB 397, 400 (1964). See also *Grede Foundries, Inc.,* 153 NLRB 984 (1965). In my view, this is not the case where there would appear to be warrant on the overall facts to conclude that the substance of the comparison as made, exists, and has been only imprecisely vaguely, or even inartfully summarized; nor a case where, at best, there may have been only exaggerations or assertions made subject to different interpretations, but not such as to be concluded as constituting substantial misrepresentations of the actual economic base which is in such manner presented for the comparison; or in the overall circumstances presented unlikely to have had impact on employees.[18] Here, in

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18. See and compare: *Russell Newman Manufacturing Co., Inc.,* 158 NLRB 1260 (1966) (in regard to accurately summarized total wage improvements, though unspecified as being "over a three year period"); *Shaffer Bayport, Div. of Shaffer Tool Works,* 170 NLRB 1506, 1507 (1968) (referenced wages closely approximating actual rates, with addition of fringe benefits); *The Jeffrey Manufacturing Company, Morristown Division,* 180 NLRB 701, 703 (1970) (wages substantiated with incentive considerations); and *Wagner Electric Corp.,* 227 NLRB 1748 (1977), enf'd. 586 F.2d 1974, 1977 (5th Cir. 1978), (cost-of-living

(Continued on following page)

contrast, it is observed that the misrepresentation involved wage rates, which were offered by the Union on each of the 14 classifications in the flyer, for comparison by the employees, with their own wages in the plant, and which, even with factoring of an allowance for applicable cost-of-living (as found by the Regional Director), nonetheless contained across-the-board significant discrepancies or overstatement. The presented rates were thus found by the Regional Director (and uncontestedly so by the Union) to be, in regard to each classification, 11-cents to 30-cents higher than the actual wage rates in effect under the California contract. I am thus constrained to conclude that across-the-board discrepancies of that magnitude in rates presented by the Union to the employees for a comparison of their own rates, is of sufficient stature to constitute a substantial misrepresentation thereof by the Union.[19] In passing I would further

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Footnote continued—
increases accurately presented, though with certain misstatements in regard to effective months). For similar treatment of other exaggerations and overstatements also not deemed amounting to a substantial departure from the truth, see *Follett Corporation*, 160 NLRB 506 (1966); and *Cross Baking Company, Inc.*, 186 NLRB 199, 200 (1970).

19. To be sure the Respondent would apparently contend, *inter alia*, that there may have been a view to support even higher variance, as much as $2. There is, however, no clear and/or convincing evidence in the present record to support or reject such a finding; and it would seemingly thus appear under all of the circumstances that further hearing thereon would be necessary before that contention might be resolved. However, in my view, even the Respondent's raised spectre of the contended $2 variance, or misrepresentation, does little to diminish the uncontested across-the-board discrepancies of 11-cent to 30-cent as sufficient to constitute a substantial misrepresentation, whether by originating campaigner intention, or not. Consequently, I have concluded that further hearing thereon (or on any other matter which might be deemed as in factual contention), is not necessary or warranted in view of all the attendant circumstances. Cf. *Westinghouse Electric Corporation*, 240 NLRB No. 106; *Huntsville Manufacturing Company, A Division of M. Lowenstein & Sons, Inc.*, 240 NLRB No. 172, footnote 1; and *Bata Shoe Company, Inc.*, 157 NLRB 1, 5-6 (1966).

note that Respondent's reliance on pre-*Hollywood Ceramics,* Board holding in *The Cleveland Trencher,* case, *supra* would appear generally supportive that variances of the magnitude here reflected are to be regarded as substantial. However, as the Union told the employees that rates offered for camparison were (only) "some rates" of the contract, in my view, the Respondents' additional reliance on the Board's holding in The *Calidyne Company, supra,* is misplaced, as that case would appear in that respect inapposite on its facts.

Finally, in regard to Respondent's intended reliance on *Houston Chronicle Publishing Co., supra,* with all due deference to that court's view, I am nonetheless bound by existing Board precedent which would appear to remain contrary in assessment of the particular circumstances there presented.

I further conclude and find that other circumstances also shown unequivocally attendant in this matter were as follows: that the Union had thereby presented for comparison by the employees wage rates at a distant and insufficiently identified plant, which rates were made by the Union to appear to be part of an existing contract, but which rates in fact are established as being substantially inaccurate; and further that these inaccurate rates were presented under circumstances reasonably to be deemed as suggesting to employees that the Union had special knowledge thereof; and in circumstances, and so close to the election as to preclude the employees, who themselves under such circumstances are to be regarded as having had no access to the contract, from any independent evaluation, and as well, to preclude the Employer from making an effective reply. Election misrepresentations of this type, nature and circumstance, when pre-

viously reviewed under the *Hollywood Ceramics standard,* have been consistently held by the Board to be enough to warrant an invalidation of the results of such a conducted election, whether the misrepresentation be brought on by Employer, or union conduct, cf. *Steel Equipment Company,* 140 NLRB 1158 (1963); *Western Health Facilities, Inc.,* 208 NLRB 56, 57 (1974). See also *Zarn, Inc.,* 170 NLRB 1135 (1968); *Allis Chalmers Mfg. Co.,* 176 NLRB 588 (1969); and *Nash Finch Company,* 242 NLRB No. 198 (1979).[20] It is well established that in defense of its refusal to bargain with a certified union, the burden is on the Respondent to show that the underlying election on which a certification rests, was one that was not fairly conducted and the resulting certification was thus improper, *N.L.R.B. v. OK Van Storage, Inc.,* 297 F.2d 74, 75 (5th Cir. 1961); *N.L.R.B. v. Mattison Machine Works,* 365 US. 123, 124 (1961). Having concluded above that there is merit to Respondent's contention for an application of current Board precedent as contained in *General Knit,* and having further concluded that application of the

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20. On the matter of the employees' ability to independently evaluate, I have not overlooked in my consideration the effect of the Board's holding in *Essex Wire Corporation,* 188 NLRB 397, footnote 3 (1971), mod. on other grounds 496 F.2d 862 (6th Cir. 1972). There the Board while setting aside an election on other grounds, concluded that the election should not be set aside on the basis that both parties in presenting their arguments on the same issue (involving compared wages at identified plants) had both done so (if independently considered), in certain respects, seemingly substantially inaccurately. However, under the overall circumstances there presented, the Board expressed an unwillingness to conclude that the employees could not have evaluated an issue thus addressed and presented to them by both parties, though in some respects inaccurately by both parties. It is my view, however, in any event, that the instant case is one which is wholly distinguishable from *Essex Wire, supra,* in that the California contract containing the accurate rates was never sufficiently identified either to the employees or the Employer; the employees did not reasonably have access to it; nor did they have an opportunity prior to the election to evaluate any Employer response to it.

Hollywood Ceramics misrepresentation standard (therein reaffirmed) to the substantial wage rate discrepancies (earlier found by the Regional Director) does appear to raise circumstances such as would warrant the Board to reconsider its prior certification of the Union, I further now conclude and find that Respondent has successfully defended its present refusal to bargain with the Union. Accordingly, it will be recommended that the above allegations that the Respondent has violated Section 8(a)(5) and 8(a)(1) by refusing to bargain with the Union on request and by refusing to supply the Union with requested data, be dismissed in their entirety. It would appear to follow, and it is consequently recommended as well, that the other allegations of the complaint, earlier identified as also dependent on the efficacy of the aforesaid certification of the Union, be also dismissed in their entirety. However, for reasons earlier noted, I shall continue to consider and resolve the factual matters bearing on the remaining allegations of the complaint.

3. In Regard to an Alleged New Absentee Control Program Based on a Point System.

The complaint alleged that in or about June, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new abstenteeism control program based upon a point system without any prior notification to or consultation with the certified union.[21] I conclude that this specific allegation is not sufficiently supported by the facts established of record.

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21. This is an allegation that would appear controlled by earlier disposition of the 8(a)(5) allegation of refusal to bargain. Apart from such consideration, although there was much litigation of this allegation, the controversy ultimately centers on unique circumstances, on which there is observed to be ultimately little factual evidence in conflict.

It is uncontested that during this period a letter from William P. Sheffield (Respondent's Vice President) was distributed to all hourly employees. Insofar as is deemed pertinent, Sheffield's letter to employees prefaced:

> Your supervisors have indicated that there is some confusion as to how the attendance program works. Consequently we have prepared this outline of how the program is administered. This program has been in use at several Van Dorn plants for a number of years and we believe it provided a fair and uniform attendance procedure. It is important to point out that the purpose of the program is to correct individual absentee problems, not to impose discipline. Each employee's attendance is important to the smooth operations of the plant and the maintenance of required production levels.

The letter went on to list categories of absence as being Excused, Reported and Unexcused. Short days (tardiness and left early) were similarly to be processed. Listed under excused absences essentially were absences which had already been long recognized by Employer in its "Employee Relations Policy Manual" which was itself previously provided to all employees. Referenced procedures for reporting absences followed procedures in place, known to and previously followed by employees. Absence records were kept on an annual basis, and discipline cleared upon the employee completing a year without further incident, a condition also previously known to employees (e.g. acknowledged by Charging Party Vale). Disciplines to be awarded (for absences/tardiness) were progressive, *viz.*, for first offense—a recorded verbal warning; second offense—written warning; third offense—three (3) day suspension, and fourth offense—discharge. These also

were the same as had previously published to employees in the "Employee Relations Policy Manual" (and had been such on this record since 1974). It is thus clear of record that the issue in this case relates to the identification and notice given to employees at that time that a certain "'weighting amount" (points) were applied to instances of absences/tardiness. Thus the letter notified employees, as follows:

> Once an absence has been given a category above, it will be given a weighted amount as follows:

Absence Category	Weighting
E—Excused Absence	0
Excused Short Day	0
C—Reported Absence	1
Reported Short Days	½
X—Unexcused Absence	2
Unexcused Short Days	½

The letter also notified employees: "Whenever an employee accumulates a weighted total of 7, the appropriate offense discipline will apply. After another 7, the next offense discipline will apply, etc." I find it is the alleged implementation of this weighted point system in June to which the complaint allegation is addressed. The issues would appear to be twofold whether the above point weighting system was in effect prior to June; and even if so, whether mere publication of the details of the point weighting system in June constituted a violation of Section 8(a)(5) and (1). Thus it is General Counsel's basic position as expressed at the outset of the hearing and in brief that Respondent's letter to all its hourly (unit-inclusive) employees set forth a new (changed) absenteeism/tardiness policy, *viz.*, one based on a point system; and

that Respondent did not bargain with the Union prior to publishing and distributing its June policy letter containing the new system.

The parties have stipulated the names of 13 employees (including Individual Charging Party Thomas W. Vale) who have been since June disciplined by the Respondent pursuant to such policy. Business Representative Davis again credibly testified that the Respondent has never notified the Union that Respondent desired to change its absenteeism/tardiness program; and Davis testified and I find that the Union has never waived any right to bargain with Respondent over changes in Respondent's absenteeism/tardiness policy. However, called as a 611(c) witness by General Counsel, David C. Bragg, Respondent's Director, Employee Relations, testified that while the Respondent did (unilaterally) publish the attendance program to employees in June, it was not a new program. Respondent continues to defend that it had no duty to bargain with the Union (for reasons earlier considered and concluded to have merit) and argues it could have changed its attendance policy at that time, if Respondent had wanted to do so. However, Respondent further contends that in this instance it has not even done that; and that rather, what it did in June was to merely inform employees at that time of the policy that it had been already applying, thus in effect, it did no more than post a written policy which has included Respondent's existing practice in the plant of using a point system to administer fairly its published disciplines for control of absences (and short days). Thus Respondent at hearing and in brief contends that there resultingly has been no change in the discipline that an employee has received for any particular instance of absenteeism or for any employee record of absenteeism. It is Respondent's further contention that consequently

no employee has been adversely affected in any way by this publication; and Respondent asserts specifically that those employees who have received discipline for absences since July 1, would have received the same said discipline for similar (absenteeism/tardiness) records prior to that time. Accordingly, the Respondent contends there was in fact no change in connection therewith and consequently there was no unilateral action taken in violation of the Act, in any sense.

In addition to testifying that the program published in June was not a new attendance program, Bragg testified also generally that it was one (with point weighting) which had been in effect at Respondent's Strongsville facility well before June. Bragg acknowledged that Respondent's "Employee Relations Policy Manual" (applicable only to Strongsville), does not make any reference to point weighting of absences/tardiness.[22] Nonetheless, Bragg testified that he had personally installed a program (with point weighting) at Respondent's other facilities.[23] According to Bragg the attendance control program used at those facilities was no different than the program used at the Strongsville facility. Bragg testified that it was well before June that the Respondent at its Strongsville facility maintained an attendance sheet on each employee, on which a recording was regularly made of an employee's absence or tardiness (excused or unexcused). Bragg acknowledged that the other facilities had written doc-

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22. It appears an employee is provided a copy of the above manual on hire, with updating issuance provided on change, usually occurring upon a change of plant manager. However, the last dated formal policy statement in regard to offenses and discipline was in 1974.

23. The facilities to which reference here is made are two, one (presently operative) at East 79th Street, Cleveland, Ohio, and the second (formerly operative) at Indianapolis, Indiana.

umentation of points that were attributed to employees for their absences/tardiness, though noting even there, it was not so from the start of the program at those locations. Bragg, however, also testified that prior to June the attendance sheets maintained at Strongsville did not include written documentation of the number of points, an understanding by him which we shall see is in conflict in that particular, with the testimony of the manager subsequently made responsible for the running of the program at Strongsville and contraindicated by certain (I find convincingly so) documentary evidence. However, even in that latter respect, Bragg had also compatibly testified that the personnel manager at a given facility would have certain discretions, e.g., specifically over the mechanical recording of points in writing, so long as the established guidelines were followed equitably.[24] Bragg, who is also located at Strongsville, testified that these guidelines were followed at Strongsville, relating his awareness that an attendance record on each employee was logged by a receptionist, with instruction that when an employee got to a certain level of points, the receptionist was to send a copy of the attendance record to the personnel manager. Bragg testified that the employees disciplined at Strongsville since June, would thus have received no different discipline than what they would have received for similar records of absences/tardiness

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24. The guideline of progressive disciplines for absenteeism/tardiness has been earlier referred to. Additionally, the policy statements applicable to the managers' responsibility in the administration of an equitable system of rules and regulations and to provide "fair and consistent disciplinary action when an employee fails to observe such regulations.", were in effect since 1974, and published. There is thus general support for Bragg in the policy expressions published to employees in the "Employee Relations Policy Manual," in regard to Company Regulations and Disciplinary Actions Policy, effective at Strongsville, since November 18, 1974.

before the June posting. However, Bragg conceded that the June posting may have been the first time the employees actually became aware that they did receive points for their absences/tardiness as he did not know whether, or how information on it had been previously published to them.

Individual Charging Party Vale has been employed by Respondent for some 7-8 years. Vale testified that earlier in 1976, 1977, he had had prior occasion to receive several verbal and written disciplines for absences/tardiness. Vale confirmed he had received a copy of his attendance sheet which had listed his absences and tardiness. However, Vale testified that prior to June he was not personally aware of the existence of any point system; and that indeed on one occasion when he had inquired of his foreman about how a discipline was awarded he was told only that after so many instances he was to receive a written discipline. Vale also testified that on the occasion of being given a copy of the June letter he was told by his foreman at that time that it (the letter) was the new procedure which would go into effect on July 1.

Respondent's witness, Gary M. Kupec testified that he had been employed by Respondent for 3 years, the first 2 years he being employed as a Supervisor of Employee Relations at the Cleveland, Ohio facility, and the last year as Manager of Employee Relations at Strongsville. Although Kupec received his appointment as manager on October 1, 1977, there was apparently a period of transition, and in any event he did not arrive at the Strongsville facility until the first or second week of November, 1977. In testifying as to matters pertaining to the absenteeism/tardiness control procedures and prac-

tices, I found Kupec to be a frank, candid and usually precise witness. I credit his testimony in the main.[25]

Beginning observation and finding is made that it was Kupec's personnel office which was most directly responsible for the day-to-day operation of Respondent's attendance control program. Kupec confirmed Bragg that both the Cleveland and Strongsville facilities previously had a weighted point system. However, testifying candidly (and contrary to Bragg), Kupec also related that the one at Strongsville was not the same as the one at Cleveland. However, Kupec did corroborate Bragg that Respondent's attendance control program at Strongsville, as structured and posted to employees in June was in effect well prior thereto, later testifying it had been in fact so structured since (at least) January 1. However, Kupec testified that at all times prior to the June posting the point weighting system which he administered had been strictly an internal control program run solely by his office.

According to Kupec the attendance recording procedure existing at Strongsville, included a timekeeper making a daily list of people who were absent or had a short day, i.e., were tardy or had left early. The time-

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25. Kupec testified on these matters on three occasions, i.e., on each day of hearing. On the first day as Respondent's witness in case-in-chief; on the second day again as Respondent's witness but in response to an earlier inquiry of the court made to both Counsels in regard to availability of certain documentary evidence potentially helpful to resolution of the factual issues; and finally at reopened hearing following a grant of General Counsel's Motion (over Respondent's opposition), in explanation of certain documentary evidence offered by General Counsel and received in evidence over Respondent's continued objection. However, it would serve no useful purpose to Marshall [sic] Kupec's overall testimony in that procedurally explainable but subject disjointing manner. Rather the overall thrust of his testimony is presented by subject consideration, and essentially done chronologically from his vantage point.

keeper's list was forwarded to Kupec's personnel office. This absenteeism list was then forwarded by the personnel office along with a call-in sheet (containing the names, etc., of individuals who had reported their absences, etc.) to Respondent's receptionist (Debbie Laszlo) who then made appropriate entries in a daily attendance book which she kept on each of the employees who numbered in total during material times anywhere from 285 to 310.[26] Laszlo did not testify in thus [sic] proceeding. However, according to uncontradicted and in part corroborated testimony of Kupec, Laszlo was advised by Kupec that an employee upon reaching a multiple of seven (7) points was to be regarded in violation; and Laszlo was instructed that at that point she was to pull the individual employee's attendance sheet and forward it to personnel for an appropriate disciplinary action. In the case of a forwarded attendance record, confirmed by personnel as being such as to warrant discipline, a typed warning, etc., was then prepared and forwarded along with a copy of the employee's attendance sheet to the employee's foreman. The foreman retained authority to clear any of the recorded absences of any errors, e.g., (unnoted) excused absences; but if the record stood as accurate, the foreman would then award the provided written discipline and also provide the thus disciplined employee with a copy of his attendance record in support of the discipline awarded. It was also Kupec's candid testimony, again contrary to Bragg's understanding, that essentially following his arrival, in December, and

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26. The record reveals that the receptionist job was actually even otherwise a combination position. Thus, Laszlo served essentially as the (sole) regular switchboard operator as well as receptionist and she performed sundry other job assignments, e.g., regular maintenance of newspaper ads, served as key operator on a telecopier, provided certain reliefs, performed special assignments, as well as keeping the aforementioned daily attendance records.

in any event commencing January 1, he had made certain adjustments in the recording system. Kupec thus principally testified that it was at that time that he had instructed Laszlo that she was to begin entering in addition to the absence, the appropriate weighted points directly on the employee's master attendance sheet, which she thereafter had done. The points had not prior thereto been actually entered on the employee's attendance card.[27] According to Kupec, during the period January 1 through June 30, when such a master employee attendance sheet was forwarded to personnel with the points added to the record, a copy of same was then made, *and* the points "whitened out" on the copy, usually by him, and a copy of the "whitened out" attendance sheet then forwarded to the foreman for use in accordance with the usual procedure. It was Kupec's testimony that unfortunately some employee records warranting discipline had slipped by Laszlo, resulting in some employees not receiving discipline at the proper level. On that account, Kupec relates that he had initially conducted periodic audits; testifying that he had conducted such audits in March and May. According to Kupec this was the attendance program with internal control by point weighting fully in existence from January 1 through July 1. Kupec testified there was no change effected in it by the June posting (or publication); other than that employees were notified of its details.

Kupec thus testified that the posting of the weighting control program in June came about as a result of some confusion of supervisors as to the weighting of absenteeism

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27. Although there is an obtuse reference to an adjustment in call-in, this is the only clear adjustment made prior to January 1. Point weighting existed prior thereto. There is no issue of any unilateral act at this time.

and short days which had surfaced in a foreman's meeting in June. Kupec explained that though there might have been some talk about the point system prior to June, the point system was one for internal control purposes only; that the point system had never previously been published through his office; and that foremen thus also had not been made privy to the weighting factors or the different categories of absences. According to Kupec, it was because of foremen confusion in this area which surfaced in the meeting of foremen in June, that it was decided at that time to publish the program and start anew. (Kupec was essentially corroborated in the latter respects by Quality Control Supervisor Dennis Dick and Foreman Valdis Kaminskis).[28]

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28. Dick, who was employed at Strongsville for just under 2 years, on cross-examination by General Counsel, testified that he first became aware that absenteeism at Strongsville was kept on a strict point system around the beginning of June. Dick testified that he hadn't been involved with points prior thereto. However, Dick did confirm that the existing procedure was that it was the foreman, who would be notified by Employee Relations who controlled the recordkeeping, that a warning of an employee was then warranted, e.g., for absences; and that the foreman's function was then only to ensure that there was no error in the absence information supplied by Employee Relations. Kaminskis had been employed at Strongsville for 7-8 years, but only since July 29, 1977, as machine shop foreman, immediately prior thereto being employed as an inspection leadman. Kaminskis confirmed that in the June foremen's meeting absenteeism was discussed; that Bragg had told the foreman that there was a point system applicable to absenteeism and tardiness; that the supervisors had heard about it before, but they did not have the actual figures to work with; that the foremen wanted it also to be made known to the people on the floor exactly what the point system was; that the foreman had then requested the point system be published and that they were told it would be published and go into effect July 1. Perhaps even more significant was Kaminskis' testimony on cross-examination, again without subsequent contradiction or rebuttal that in *1976*, his own foreman, Tom Naypauer, had informed Kaminskis that Kaminskis had a number of *points* (sufficient) to merit a verbal warning, which he had then received.

Following inquiry the Court made of both counsel at the end of hearing on the first day as to the availability of any of the attendance sheets to assist in resolution of the issues, Kupec returned to the stand the next day. Kupec testified that he had made random sampling of the aforesaid records; produced five such attendance sheets (Respondent's Exhibits 2-6); and testified that the other employees had similar records. Kupec testified that the point weighting there shown over the period January-June was on the same basis as that set forth in the June publication to employees.[29] On further cross-examination by General Counsel, Kupec acknowledged that he had informed an employee on July 21 (in writing) that the effective date of the procedure was July 1; and acknowledged further that the same employee had subsequently filed a complaint thereon that "the new attendance 'points' policy was not published to employees. This policy was made retroactive to January 1978 without notification to employees."; and that the Company's answer as given by

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29. The records are observed to be substantially supportive of that testimony in that Respondent's Exhibit 2-6 depicts as follows: R-2, 4 entries with last March 4 and showing accumulated 5-½ points covering *inter alia,* a weighting of 1 point for a reported absence and 2 points for an unexcused absence in January, and one-half point for a tardiness in March; R-3 depicting charged short days and excused absences (on basis of doctor note and hospital tests); R-4 depicting an accumulated 1-½ points for three instances of tardiness in March; R-5 showing 11 entries from January 7 through June 13, with 10 entries in regard to short days and with various notations of reported reasons, for snow, illness of family and self, some excused, some not, and with accumulated point total of 4; and notably also showing an individual personal request for a leave of absence over the weekend of 6/9 etc.—6/14 (but dated 5/5/78) for stated purpose of being able to make a short trip over that weekend without "risking an unexcused absence"; and R-6, with 7 entries of excused and unexcused absences with first entry January 13 and last entry on April 27, with accumulated point total of 6. Respondent's Exhibits 2-6 were received over General Counsel's Objection which was solely made on the basis all of the attendance records had not been produced.

him on July 26 was: "The effective date of the program distributed to all employees on 6-28/6-29-78, was July 1, 1978." Kupec testified that new attendance records were started for all employees on July 1. Kupec explained further that they cleared the records inasmuch as they were publishing the program for the first time to all employees; and they felt that now that employees were aware of the program they would, in essence, start anew, start with a clean slate. (This forgiveness of past record of absence/tardiness was not alleged as discriminatory or unlawful benefit grant in violation of Section 8(a)(1).)

Hearing in this matter was reopened on December 6.[30] At reopened hearing, certain documents (including some attendance sheets) were offered by General Counsel and received over Respondent's continued objection. However, at hearing, as a result of further prehearing conference and inspection of original documents, the parties were able to agree and stipulate that point totals did in fact appear on the original attendance records of the three employees whose attendance records were subsequently offered in evidence; and even more significantly that these totals *were* "whited out" and thus did not appear in copy supplied to the respective employee. With such agreements and record testimony thereon, three exhibits (I now find)

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30. As earlier noted on November 9, General Counsel had filed Motion to Reopen Hearing for purposes of presenting certain newly-discovered evidence of the existence of employee attendance records for the period January 1, to June 30, which purportedly did *not* contain point notations. (The motion also contended certain records indicated that the disciplinary formula published by Respondent in June was not enforced prior to July 1, 1978.) Over Respondent's objection, the hearing was ordered reopened for the *limited purpose* of presentment and ruling upon receipt of the certain documentary evidence described therein bearing upon complaint allegation that Respondent had unilaterally implemented a new absentee control system based upon point system, and if appropriate, rebuttal evidence of Respondent.

also bear visible evidence of the "whitening out" process. (A fourth record reflected point total, all of which, however, occurred post July 1.)

The reopened record otherwise has established that employee James H. Harper received a suspension on March 21-23, though his attendance record revealed last entry occurred on February 11 by which time he had accumulated 7 points. The record also reflects that in 1978, prior to July 1, employee Robert Behum had received only a 3-day suspension on March 21-23,[31] despite the attendance record of Behum exhibiting that prior thereto Behum had had recorded at least 7 instances of unexcused absence and 2 instances of tardiness (or 15 points) at the time. Further, his record reflects he had accumulated 7 additional points by June 23, sufficient for discharge, but he was not discharged at that time. Finally, the record before me reflects that in 1978, prior to July 1, employee David L. Taylor had received a verbal warning in May, this despite the attendance record of Taylor exhibiting that prior thereto, Taylor had had recorded some 25 instances of tardiness and 7-8 unexcused absences, or enough points for discharge.

Called as a witness by Respondent and testifying in explanation of the handling of the above attendance records, Kupec testified that the above points were entered by Laszlo on these documents at time of occurrence; that

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31. The record contains one stipulated reference to Behum's suspension being served May 21-23 and it being the only discipline Behum received in 1978 prior to July 1. However, Behum's attendance record in evidence reveals clear notation that a suspension occurred on March 21-23 and no reference to an award of such in May (see G. C. Ex. 9(b)), a fact further corroborated in other documentary memorandum from Behum's foreman (see G. C. 9(a)), as well as other testimonial evidence to that effect. I am thus persuaded and I find that Behum's suspension award occurred on March 21-23, rather than May 21-23.

in the periodic audit he conducted in March, he discovered that employee Behum was overdue and at that time Behum was awarded the next step discipline which for Behum was suspension; and that Behum was not discharged following June 23 incident inasmuch as at that point they were going to publish the program and did not give discipline to *any* employee in June. Kupec testified that in a similar audit conducted in May that he only then discovered that employee Taylor had not been disciplined and he was awarded the next step of discipline which in his instance, despite his number of points, was a verbal warning. On inquiry of the Court, Kupec freely acknowledged there had been even other instances of such employee discipline oversights discovered by him in the audits he conducted in *both* March and May; and Kupec further acknowledged that the Taylor matter was an instance of his own audit oversight in March. Kupec testified finally, that as a consequence, since July, he has kept the daily point recording to himself. Kupec explained he did so to maintain better control and to ensure that type of problem (e.g. Taylor oversight) did not occur again. Kupec also freely acknowledged on inquiry of General Counsel that since July, he has resultingly actually kept a stricter (daily) oversight of employee records of attendance. Finally it seems appropriate to note what is both well evidenced in this record, impressed me at hearing, and reflected in this decision viz. Kupec in discussing his personnel office's operation was consistently a frank, candid and I conclude therefore, generally credible witness.

Analysis, Conclusions and Findings

On the basis of the weight of the above credited testimony and documentary evidence, I am convinced and I find that Respondent's personnel office, under the management of Kupec, was controlling employees' absences and

short days through an established and published progressive system, which, however, was itself regulated by an internal control system of point weighting which existed well prior to the month of June; and I am further wholly persuaded as well and I find that, contrary to complaint allegation, that Respondent's present structure of point weighting as published to employees in June was one which had been in effect at least 6 months earlier, *viz.*, since January 1.[32]

The fact that this record reveals that there were discipline oversights, e.g., individual breakdowns in discipline level evaluations in the daily recording of attendance absenteeism and short days on some 300 employees does not, in my view, change the fact otherwise convincingly evidenced that an internal control system involving point weighting of such absences was in place and operative in this period. Nor does the circumstance that in July, Kupec personally began to keep the points daily (instead of Laszlo) change the nature of the established disciplinary control procedure itself, rather only its potential for efficiency and accuracy. It would appear thus to follow that the allegation of the complaint that in June the Respondent unilaterally implemented a new absenteeism control program based on a point system is not shown factually supported by the record. I so find. In making such finding I have no hesitancy on this record in finding as well that the weighting point system was not one theretofore published

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32. Certain of the documents produced by General Counsel provide indirect evidence of points being assessed, in the sense of evidencing their removal (i.e., the "whitened out" process). They were obviously received by employees with disciplines awarded before June. They are compatible with other similar documentary evidence earlier produced by Respondent. These records, along with the thus supported and credited testimony of Kupec, and others, are deemed conclusive on the matter of point weighting use.

to employees; that it previously was strictly used for internal regulating control purpose by the personnel office which had that (published) responsibility; and that resultingly, employees generally, and some supervisors were not individually aware that the Employer was strictly using the point system in the control of its employees' absences by discipline awards. However, I am as well convinced on this record that supervisors were generally aware that there was a point system, though they did not have the details of its operation, and not unreasonably so, since it was an internal control measure utilized solely by the personnel department which kept the attendance records. Thus unless it is to be concluded that the mere publication of the details of the existing practice alone is sufficient to constitute unilateral action, the instant complaint allegation must fail on the facts. Where there is independent and convincing evidence that a practice was in place and operative, as there is here that the practice or systematic use of weighting points on absences/short days was in place and operative in Respondent's plant, I do not believe that the mere election of Respondent in June to publicize to its employees the details of that established practice for their working place edification constitutes a unilateral change in their employment conditions, anymore [sic] than it would effect change in their working conditions for an employer to inform a chosen bargaining representative of that fact upon an inquiry of the latter as to the details of how the Employer's discipline of absences was then being administered. In short, I conclude and find that by publicizing to its employees its established and operative internal practice or system of point weighting, convincingly shown as used for some 6 months prior to June in the control or regulation of its (published) progressive disciplining awards for employees' absences/short days, that Respondent has not thereby implemented a new absentee control

program based on a point system; and consequently Respondent has not at that time engaged in a unilateral change of existing terms and working conditions of its employees within the meaning of Section 8(a)(5) and (1) of the Act.[33]

Finally, I address argument of General Counsel raised in brief that even assuming that the policy was in existence and enforced prior to July 1, the plan was at best, prior to July 1, haphazardly enforced. In that connection General Counsel has called for an adverse inference to be drawn over Respondent's failure to produce records to show that the 7-point element of the system was enforced prior to July 1, in the face of General Counsel's evidence offered at reopened hearing showing that it was not done so in regard to employees Taylor and Behum. An adverse inference is warranted, of course, where he who has the burden, and strong evidence bearing thereon, fails to produce it. Fair inference is that he does not produce it because it does not support his position. However, under the entire circumstances of this case, I decline to draw such inference.

Firstly, the complaint allegation is not addressed to claimed unilateral action or change in June in enforcing or more strictly enforcing discipline at a 7-point level. Rather, it very clearly has charged Respondent with an implementation of a *new* absentee control program *based on a point*

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33. General Counsel's reliance on *Southland Paint Company, Inc.*, 157 NLRB 795, 796 (1966) would appear misplaced as in that case the Board concluded it was *unnecessary* to separate old rules from the new where it was clear that the record did not establish prior existence of *each* of the 26 plant rules and where the rules themselves were published under case circumstances revealing such publication was a part of the Respondent's overall and continuing conduct aimed at undermining the Union's strength and of retaliating against its employees for selecting the Union. Here there is neither allegation nor proof of the latter.

weighting system. It was thus General Counsel's burden to show that a new absentee control program was in fact implemented (developed or introduced) based on a point weighting system at that time. It was Respondent's burden, in terms of its advanced defense, *inter alia,* to show that the point weighting system, which it published in June, previously existed, which I have now found on convincing evidence was the actual case. Secondly, the short answer to General Counsel's present contention that even if the point weighting system previously existed, it was not enforced, is, that was not the allegation of the complaint nor the issue litigated. Thirdly, even if it be assumed, *arguendo,* that the enforcement of the 7-point level is reasonably to be viewed as encompassed within the present complaint allegation, I would still conclude this is not a case for adverse inference. In the latter respect, it cannot reasonably be argued even then that the enforcement of the 7-point level was other than one subordinate element of the complaint allegation. At close of hearing on the first day, the Court inquired of *both* counsel as to the availability of attendance records upon which point factoring had, according to testimony of Kupec, occurred, to assist the Court in resolution of this factual matter. In response thereto Respondent's witness Kupec on the following day *produced* sampling of such attendance records and testimony that there were others. The sampling records offered the various point weighting of the order published in June was being assigned to the various classifications of absences/short days during the period of January through June. General Counsel's records subsequently offered in reopened hearing[34] were acknowledge to bear evidence of

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34. Hearing reopening itself was limited to documentary evidence bearing upon complaint allegation that Respondent unilaterally implemented a new absentee control system based on point system and if appropriate rebuttal evidence of Respondent.

whitened out process and failed of original intention as evidence that point factoring on these employees had not occurred. In fact they are convincing evidence to the contrary. To be sure the samplings offered by Respondent do not portray a 7-point enforcement, and General Counsel has produced evidence of employees Behum and Taylor where the 7-point level was not in fact enforced. However, Respondent offered credible evidence in rebuttal (explanation) thereof. I am thus reluctant to draw adverse inference in the above circumstances; and especially so where other documentary evidence offered by General Counsel, e.g. attendance record of Harper, if anything, would serve to support enforcement at the 7-point level. Other arguments raised by General Counsel either fall short of complaint allegation and/or litigation considerations, or are not persuasive in the face of the above evidence, including the testimony of Kupec, whose testimony in this area I have found credible. Untimely correction of[35] occasional plant errors of omission in a plant this size, in my view, is plausible, and thus does not make for an automatic violation of the law; nor convince me that adverse inference is appropriate in the circumstances of this case.

I thus conclude and find that wholly apart from the ultimate efficacy of any other Employer contention in defense (e. g. of substantial misrepresentation, that the instant allegation of the complaint that the Employer has acted unilaterally in implementing a new absenteeism control program based on a point system is simply one not

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35. For general discussion in this area, see Wigmore, Vol. II. Section 291, pages 180-88, Third Ed. (1940); and Jones on Evidence, Vol. I, Sections 26-33, pages 58-65, Fifth Ed. (1958). Respondent's witness Kupec having direct knowledge of the system, testified thereto and having produced supporting documentary evidence, adverse inference did not further lie on basis of Respondent's failure to call Laszlo, Id. Section 29.

shown factually supported on this record. Accordingly, I shall recommend that this complaint allegation also be dismissed.

4. The remaining allegations of Section 8(a)(1) interference, restraint and coercion.

a. *The alleged interrogations by Vice President Sheffield.*

The complaint alleges that on March 16 or 17, and again on May 14 that Vice President Sheffield interrogated an employee concerning his union activities, sympathies, membership and/or affiliation of other employees. Respondent defends that if any such conversations occurred, they were not unlawful under the attendant circumstances.

Thomas W. Vale has been employed by Respondent at its Strongsville plant for 8 years, and at time of hearing was employed as a numerical control machinist. The record reveals that Vale had been initially active on the Union's organizational committee and that in an election conducted on June 12, 1977 for various employee positions with the Union, Vale was elected to serve on the Union's negotiating committee. However, it was not until by letter dated February 22, that the Union notified Respondent's President Samuel H. Smith. Although no copy was sent to Sheffield, he acknowledged that he became aware that Vale occupied some position with the Union; and Respondent has stipulated that the Employer was aware that Vale held a position on the negotiating committee prior to the incidents described hereinafter. I am convinced and I find that Sheffield was aware that Vale held a position on the Union's negotiating committee at the time of the following conversations he had with Vale. The instant conversations centered around employee strike votes. The

parties have stipulated that two strike votes were taken by the employees, one on April 2, and the second on May 7.

Vale relates that it was about March 16 or 17, though I find probably a week or so later, that Sheffield approached him in the plant by his machine while Vale was having a cup of coffee. Two other employees, Jeff Tellak and Jimmy Ditch were also present but they did not testify. The record reveals that prior to this time there had been a union flyer passed out to employees in front of the plant announcing that there would be a strike vote taken on April 2. According to Vale, after plant pleasantries were passed, Sheffield asked him, "Well, are you fellows going out on strike this weekend?"; and Vale replied, "Yes, I guess we are."; adding he hoped they would save the skids for a bonfire for the picket line, at which point they all laughed. According to Vale, Sheffield also said: "Well, you guys don't have to go out on strike." and "You really don't need a union." On cross-examination, Vale did not relate Sheffield saying, "You really don't need a union" but did testify that Sheffield had said in addition to you shouldn't go on strike, that there is no point in striking. The first strike vote was taken at the union hall and voted down.

Vale testified that a second such conversation occurred in the same place on May 14 or May 21 but wasn't sure of the date. Again employee Tellak was present. I am satisfied that the instant incident occurred shortly before May 7, the date of the second strike vote. Vale relates that Sheffield approached him again and said, "I hear you guys are voting for a strike again this weekend." Vale replied they were and hoped they would win. According to Vale, Sheffield said, "Well, again, I don't think you need

it." (On cross-examination Vale again confirmed that Sheffield had said that they didn't need to go out on strike.) Vale recalls Sheffield said also, "You guys should just keep right on working and let the Union fight it out in court with the Company."; and "The Company's stand is: We don't want to recognize the Union. We want to fight it out in Court." On cross-examination Vale recalled that Sheffield told him, "Let the Union do the fighting. Why should you guys go out when the Union is going to go out and collect all the money and you lose wages. Let them fight it out in court." Vale recalled he told Sheffield that they needed a union and that ended the conversation.[36] The second strike vote was also voted down by the employees.

Sheffield relates that he regularly walks through the plant and that frequently Vale spoke with him. However, he acknowledged in regard to the first conversation, that he was at the time concerned that there was going to be a strike. He recalled asking Vale if he thought they were going to have a vote, but didn't recall clearly what Vale had responded, nor particularly the rest of the conversation. However, Sheffield testified that he did not specifically ask Vale how Vale was going to vote, or his feelings about a strike; nor about other employees' feelings. Sheffield also confirmed there was a second conversation in which they had again discussed the possibility as to whether they would have a strike. Sheffield acknowledged that the Company position was that they felt the Union ought to fight the thing out and not have everybody go out on the street; and freely conceded that he had told that to Vale. Sheffield also acknowledged that he had had other

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36. Vale testimony also did reveal that there was some prior conversation between them about the Plant Superintendent.

similar discussions with other employees in regard to the Company's position on the strike; and that he had spent time clarifying the Company's position, including concerning certain information posted on the bulletin board (discussed next).

It is observed that Sheffield's recollections are essentially compatible with Vale's testimony. I credit Vale. I further find that on two occasions shortly before each of the strike votes that Respondent interrogated an employee about an upcoming strike vote, and in substance and effect urged that the strike vote not be supported by the employees who would lose wages, that these instances were not isolated, and that thereby the Respondent has engaged in conduct constituting interference with Section 7 rights and thus conduct which I find was violative of Section 8(a)(1) of the Act. Cf. *Cagle's Inc.*, 234 NLRB 1148, 1150.

b. *The May 4 letter of President Smith*

Following certain testimony of Vale in regard to a document posted on the bulletin board, Respondent subsequently introduced in evidence a certain letter of President Smith addressed to the employees and dated May 4. After its receipt in evidence without objection, the General Counsel moved to amend complaint to allege that certain language therein contained was violative of Section 8(a)(1) which motion was granted for reasons which appear of record.

Insofar as pertinent the letter contained the following paragraph.

> First, the Company did not state that it had no intention of negotiating a contract. What the Company did say was that it would not bargain with the Union until the federal courts have determined whether the election was a fair one.

It is General Counsel's contention that the foregoing statement constituted an independent violation of Section 8(a)(1). General Counsel would rely on *The May Department Stores Company,* 191 NLRB 928, 937, a case which I would find dispositive of the issue were this a case where the facts were that the Employer during this period had refused to bargain with the Union in violation of the Act. Inasmuch as for reasons expressed at length heretofore, I have been led to conclude under applicable and current precedent that the Respondent was not under a legal obligation to bargain with the Union under the special circumstances of this case, I shall, consistently therewith, recommend that this allegation of the complaint also be dismissed.

c. *Alleged coercion and restraint by Foreman Valdis Kaminskis.*

The complaint alleges that during March 15-20, the exact date being unknown,— that Respondent had coerced and restrained an employee by Foreman Val Kaminski [sic] informing the employee that Respondent would never recognize or bargain with the Union. Respondent defends essentially that this incident did not happen. Respondent relies on Kaminskis' hearing denial and in brief contends that employee Vale's (the involved employee) testimony on the incident kept changing; that General Counsel did not offer corroborative witnesses; and that in any event the circumstances of the conversation were not inherently coercive inasmuch as there was no representation campaign going on. I reject the latter as a viable defense. Evaluation of other contentions requires closer analysis of the evidence.

Vale recalled that during the week of March 15-20, and before the first strike vote, that Foreman Valdis Kam-

inskis had come up to him while he and (unidentified) others were talking about the strike. Vale related on direct examination that Kaminskis had said: "Well I don't care if you guys go out on strike or not."; adding that Sam (President Smith) will never recognize the Union; that he would build the machines in other plants first; that they had done it before and they would do it again. On cross-examination Vale then related that the first thing Kaminskis had said was that Sam will never recognize the Union; that when Vale didn't immediately respond, that Kaminskis had then said that they had been in a meeting and that was said, that Sam wouldn't recognize the Union; they would build the machines in another plant, if you were on strike; that they have done it before and they will do it again. On later inquiry by the Court as to this incident, Vale's recollection then was that Kaminskis had told them the Company had a meeting with the foremen, that the foremen were told to go out and talk to the guys to keep them from talking about a strike vote, to talk them into not striking. On this occasion Vale recalled Kaminski [sic] had then said: "You don't have to go out on strike.", that "If you go out on strike, we are just going to build the machines in another plant"; that "Sam will never recognize the Union"; and that it was said in the meeting that (Sam) would never recognize the Union, he would fight them all the way.

Valdis Kaminskis testified that he had been employed by Respondent for 7 years and 10 months, but only since July 29, 1977 as a foreman, (thus well after the election was conducted in the underlying representation case). Kaminskis testified that he had supervised Vale during the months of April-June, though with some leading, acknowledging it could have included the month of March. Kamiskis testified unequivocably that during that period,

and, in any event, since becoming a foreman he had never told Vale that Sam Smith would never recognize the Union. Kaminskis further testified that he had never personally heard President Smith say that he would never recognize the Union. It is to be initially observed that Kaminskis did not deny having a conversation with Vale during this period about the strike, etc., nor subsequently, testify as to his version thereof.

Kaminskis did confirm that he had been present in a meeting of supervisory personnel in which President Smith had said that Van Dorn was going to test the Union's certification through court appeal. In that regard, Vale on cross-examination had denied that Kaminskis had made that specific statement to him; and Kaminskis himself, of course, has not affirmatively testified that he ever did. I thus credit Vale's denial. Kaminskis didn't know if he had ever spoken to Vale about the Company building machines in another plant in the event of a strike. Kaminskis testified that it was prior to becoming a foreman that he had told Vale that Sam Smith will fight the Union all the way.[37] Significantly, Kaminskis' testimony did not refute Vale's testimony, that Kaminskis had told Vale that the foremen were instructed to talk the men into not striking; and equally significantly, Vale did not refute Kaminskis' testimony that Vale and Kaminskis had had earlier discussions before Kaminskis became foreman in regard to the Union and the Company and specifically in regard to Kaminskis' placement of the statement that Smith would fight the Union all the way in time, prior to his becoming a foreman.

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37. Kaminskis testified that there had been no prior strike at Strongsville; that there had been one at Respondent's East 79*th* St. (Cleveland) plant; but that he didn't work there, and he didn't know if the work had been continued there or done elsewhere.

There was nothing in the demeanor of either witness Vale or Kaminskis that would warrant my readily crediting one moreso over the other. To be sure there are some sequence discrepancies in the account of Vale observable above, which do weaken the persuasiveness of certain of Vale's recollections (though not on the point of complaint allegation), since I am wholly convinced that Vale and Kaminskis had discussions in regard to the Union and the Company's reaction to it, earlier, and prior to Kaminskis becoming a supervisor.[38] I do not overlook Respondent's contention that General Counsel did not offer to produce any other witness in corroboration of Vale (nor does the record reveal clearly their lack of identity or unavailability). However, there is acknowledged evidence that Smith did speak to the foremen and tell them that the Company was going to test the Union's certification, thus impliedly, at least, foremen were told the Union would not be recognized at that time. As noted, Kaminskis has not contested Vale's denial that he was told by Kaminskis that there would be a court test, a denial which I have found credible. In that connection Kaminskis has also not denied that they did have a conversation; nor denied Vale's testimony that in that conversation that Kaminskis had related there was an instruction given to the foremen to go out and talk the employees out of striking. I am wholly persuaded that there was such an instruction and the Kaminskis-Vale conversation resulted therefrom. As I find it implausible that Kaminskis would have made no mention of the Company's basic position vis-a-vis the Union, in that conversation, on balance, I conclude and find, wholly apart from whether Kaminskis had ever personally heard Smith say so, that the weight of the above evidence makes it appear

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38. I would observe further that conversations prior to Kaminskis becoming a supervisor would, in all probability, have been outside the instant 10(b) period.

as to be the more probable than not, and thus sufficient to support finding, that some time and probably shortly before the first strike vote of April 2, that Kaminskis did tell Vale, who was then on the Union's negotiating committee, that Smith would never recognize the Union; and that the employees didn't have to go out on strike, that if they did the Company would just build the machines in another plant; that there had been a supervisory meeting and that Smith had said in that meeting that he would not recognize the Union; and that the foremen had then been instructed to go out and talk the employees out of striking. Being thus persuaded of the evidence, I further find that thereby Respondent has coerced and restrained employees in the exercise of their Section 7 rights (and Section 13 as well) in violation of Section 8(a)(1) of the Act.

d. *The alleged denial of union representation.*

The complaint alleges and General Counsel contends that Respondent on or about August 18 has violated Section 8(a)(1) by unlawfully refusing a request of individual Charging Party Vale for union representation at an interview and/or meeting which Vale reasonably believed would result in adverse action in connection with the terms and conditions of his employment and/or would result in his being subject to adverse disciplinary action; and at the end of said interview/meeting suspending Vale. General Counsel relies on *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Quality Manufacturing Company*, 195 NLRB 197 and *Mobil Oil Corporation*, 196 NLRB 1052 as explicating the basic statutory right which Vale was denied upon his request.[39] It is Respondent's contention that Vale

39. General Counsel also relied on *AAA Equipment Service Company*, 238 NLRB No. 70; *Amoco Oil Company*, 238 NLRB No. 84.

did not request that hourly employee McNeely be present until the meeting was over. It is Respondent's position that it fulfilled its obligations under the above cases, if it had any, by at that point terminating the interview.[40] Respondent contends also that Vale never asked for union representation but for McNeely by name. Since McNeely was known by Respondent to be the elected (designated) back shop committeeman, this contention is deemed perfunctorily to be without merit. General Counsel also contends that since under the holding of *Certified Grocers of California, Ltd.*, 227 NLRB 1211, that the refusal of the second request of an employee for union representation after being told his record was reviewed and he was to be issued a warning and discipline layoff, was also violative of 8(a)(1), even Respondent's version of interview cutoff at that point is without merit. Essentially the issues are observed to be: of fact, *viz.*, when during interview did Vale make request for McNeely; and secondly of law, *viz.* whenever made and refused were the circumstances of subsequent discipline such that Vale is to be deemed as having been denied union representation in violation of Section 8(a)(1). Apart from the above, the facts are essentially not in dispute.

The record reveals that Vale made a request for a leave of absence of 2 (excused) days off (August 16 and 17) to make a trip out of town to be present for his son's graduation from bootcamp. Vale's request was initially refused by the Plant Superintendent. At the time, Vale already had three attendance record points. On August 15 Vale

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40. Respondent also relies on *Diamond Reo Trucks, Inc.*, 212 NLRB 651 (1974); and *Western Electric Company, Inc.*, 205 NLRB 195 (1973), where the Board held the Employer did not violate Section 8(a)(1) where the Employer permitted the employee to leave the interview after the request for representation was denied.

made inquiry of Foreman Kaminskis, if you come in at 7 a.m. and leave 6 minutes after 7, what are you charged? Kaminskis replied, "About a half a point for leaving early."[41] On the following day Vale reported at work at his apparently usual time of 6:45 a.m. However, knowing that his machine was down, he did not go to his work station in work clothes. At 7:06 a.m. he looked for his foreman (Sloan) to tell him that he was leaving. As Sloan was not in that day, Vale reported to Foreman Winley that he was leaving. Winley inquired why he had bothered to come in; and Vale explained to save his job one-half point. Winley told him that he should have taken one point and stayed home. Vale then told Winley, that Kaminskis had told him he would be marked as leaving early. Winley replied, "Well, go ahead and go. I will check into it." Before leaving, Vale also called from in plant, reporting that he would be off the next day. Vale thus expected to be charged only a point and one-half, instead of two points for his reported time off. When Vale returned to work on August 18 he found his timecard had been pulled. Vale inquired of Foreman Winley, who advised Vale that Vale was wanted in the personnel office at 7:05 a.m. Upon arriving at the office Vale observed that Kupec, Denny Dick (then Acting Superintendent) and Vale's foreman, Bill Sloan, were present. Vale asked if they wanted him and they said yes, to come in and sit down, which he did.

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41. Contrary to Vale's recollections, I credit Kaminskis' testimony that Vale did not tell him at the time what was the reason for his inquiry. Kaminskis' testimony on this matter was firmly and convincingly given and I credit it. I also credit Kaminskis that he was not aware that Vale had already asked for time off and been denied it. It is, however, to be observed that Vale, under applicable procedures, could still take the time off but would be charged points for doing so, one point per day if reported, two points per day if not.

Vale's version is that Dick began by asking if Vale knew why he was in there; and Vale replied no. According to Vale, Dick then said, "You made a mockery of the Company rules"; and Vale replied, "I don't know how." Vale relates that Kupec then told him, "Well, this is a disciplinary action"; and that he immediately replied, "Well, wait a minute. Before you go any further, I want Gene McNeely in here. I want him in here to hear what is going on." Vale has Kupec reply: "No you can't have anybody in here, this is not a complaint procedure. It is a disciplinary action. When you *come back to work* you can have anybody you want in the complaint procedure." (Italics supplied). According to Vale they then asked him what he did; Vale told them; and they told Vale he had made a *mockery* of the Company rules. Vale then said he didn't think he should be disciplined; that he thought he was being made an example of; and that he was willing to take a whole point for the day but that he thought he should be allowed to return to work. Vale relates he was told that he was being suspended until further notification, that Foreman Sloan would escort him out of the plant and that he would be notified further that afternoon by phone. At 2 p.m. Vale was notified by phone that he had received a 5-day suspension, which was followed up by registered letter. Vale pursued the matter in the available complaint procedure. During the complaint procedure, Vale requested the Company to put in writing the matter of his requests for McNeely (and denials) but the Company refused twice to do so telling him on third occasion that he could write his own complaint on it. The record reveals that eventually Vale's 5-day suspension was reduced to 3 days. There is no allegation of discriminatory treatment alleged.

Kupec testified that the Company has an investigative procedure and a complaint procedure, but no disciplinary investigation as such. Discipline may or may not occur as a result of an investigative meeting with an employee. If an employee feels aggrieved by some management action he may follow a four- to five-step complaint procedure. The first steps of the latter is between the employee and the foreman, usually oral. From the second step on the aggrieved employee may bring in two other employees to serve as representative or to assist in presenting the employee's case. However, Kupec also testified that there have been occasions in the past when an employee has been allowed to have other employees present during an *investigation,* testifying (without subsequent contradiction) that Vale had thus been allowed to be present in an investigative interview earlier in February. (Kaminskis corroborated in testifying as to an incident that he was involved in while an employee, even several years earlier.)

Kupec testified that prior to Vale's interview he was aware that Vale had requested a leave of absence which had been denied by the Superintendent; that Vale had come into work on August 16, performed no work, and punched out at 7:06-7; and that Vale had called in (from within plant) reporting off the next day. (Calling in from within the plant to report off the next day was unusual.) Kupec was not aware that Vale had spoken to Kaminskis. Kupec testified that he had subsequently left word that Vale was not to begin work until the matter was investigated in conjunction with the Department head and Vale's foreman. According to Kupec the interview was to afford the employee an opportunity to present any evidence of mitigating circumstances.

Kupec confirmed the meeting date and participants. However, it is Kupec's version that Vale did not request

McNeely until the end of the meeting. Thus Kupec testified that prior to that point he had asked Vale to state his side, why he did, what he did. Kupec testified that it was after they discussed the circumstances, that he advised Vale that he was being indefinitely suspended pending resolution or decision. Kupec testified that it was at this point that Vale stated: "Well, if I am being suspended, then I want Gene McNeely here." Kupec relates Vale was told it was an investigatory meeting, that it was the end of the meeting, that should Vale disagree with the suspension or the decision he could bring complaint and then bring full complement of employees as allowed by policy. Kupec confirmed that Vale had then (unsuccessfully) said he was willing to accept the full point; and also that they didn't have to pay him for the 6 minutes, as long as they didn't suspend him. Kupec testified that Vale then made reference to going to the Board and Kupec replied, that is your right. Kupec also testified that the decision had not been made at that time; that it is made following review of all the facts by Kupec, the Department Manager and the foreman, which was done later. Kupec did not deny the Vale asserted refusals to include mention of the McNeely request (and denial) in the first complaint steps. Dick corroborated Kupec that Vale had made his request that McNeely be present at the end of the meeting and after they had asked Vale what happened and Vale had made his few remarks in reply. (Dick recalled as a detail that Vale had made the request for McNeely as Vale was getting up from the chair.) Dick also corroborated that Vale was informed that his suspension was indefinite, that he would be phoned or wired and the length of the suspension given him. Dick did confirm that it was his view of the matter that Vale had perpetrated a mockery of their attendance control system, explaining the point as being that it was clear to

him that Vale had had no intention of coming in and going to work; that he couldn't see how there would not have been discipline in Vale's case; but also confirming that some of their investigations do result in no discipline; and acknowledging that it was following Vale's departure that they decided the discipline would be a 5-day suspension. Foreman Sloan did not testify.

Analysis, Conclusions and Findings

I find that it was following Kupec's invitation to present his side and Vale's offered explanation, and only after Kupec's announcement to Vale that he was to be suspended, that Vale had then made a request that Gene McNeely, machine shop first-shift committeeman, be brought in.[42] However, if I am convinced that Vale did not

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42. This finding is based on the following evaluations of the evidence. First, I do not believe that Kupec told Vale at the very outset of Respondent's investigative proceeding that it was a disciplinary proceeding; nor that at that point that he told Vale (immediately after Vale, reportedly in response, had requested McNeely) that Vale could have McNeely after Vale came back to work. Such a remark would not only have indicated that discipline of Vale in Kupec's mind was a foregone conclusion but would have been prior to Kupec even having heard Vale's side of the incident, which, I have no doubt, was the very point of holding this investigative proceeding. I simply do not believe this occurred. I credit Kupec's version, corroborated as he was essentially as to the sequence of that meeting by Dick, and by Bragg as to the nature of the investigative procedure being used. Nor in that context, do I find any more persuasive, Vale's recollection in regard to Dick previously having told Vale that he had made a mockery of the attendance control system, noting that Vale's version itself repeats this judgmental remark also as occurring after Vale had offered explanation, a sequence I conclude to be far more likely. Nor do I view it likely that Kupec who knew Vale had taken part in an investigatory procedure in February as an assisting employee, would have at the outset of this investigation denied Vale's request had it in fact been made at the outset. In that connection, this record reveals others had done so before, and as noted, there is no allegation of discrimination in the contended denial of an early request.

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request McNeely before initially being told of his suspension, I am as well convinced that he did request McNeely immediately thereafter and unquestionably before the management group had decided that Vale's discipline would be a suspension of 5 days. I am as well persuaded that it was only after Vale's request for McNeely was denied that Vale himself expressed willingness to accept an award of one point for the (first) day and to forego payment for any time on August 16, which offers were not accepted, and it reiterated that he was suspended; it explained that the suspension was indefinite, and that Vale would be notified of their decision on the matter later that afternoon.

I next address, on the one hand, General Counsel's contention that under the Board's holding in *Certified Grocers of California, Ltd., supra,* that even assuming the request for McNeely was made by Vale after Vale's suspension was initially announced, it was a violation of Section 8(a)(1) for Respondent to refuse Vale's request for McNeely at that point and later decide to award Vale a 5-day suspension; and on the other hand consider as well Respondent's reliance on earlier, pre-*Weingarten* Board holdings in *Diamond Reo Trucks, Inc., supra,* and *Western Electric Company, Inc., supra,* that where the

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Footnote continued—

Moreover, armed with knowledge that he had discussed the very point of likely controversy with Foreman Kaminskis the day before Vale had left on the trip, and occupying a union position himself, I view it as quite plausible that Vale would be amenable to individually present an account of his actions and reasoning to the management group. Finally, Kupec has impressed me on frequent occasion in his frankness in testifying on the operation of the point weighting system. Here Kupec's version is not only plausible, it is corroborated by others. In contrast, Vale's version is less based in probability and much less convincing. Accordingly, I have credited Kupec's recollections as to the sequence of the events over Vale's recollections on this particular matter.

Employer denies employee request but then terminates the interview, there is no violation. In *Weingarten, supra,* the Supreme Court explicated, *inter alia* (and General Counsel readily acknowledges in brief), that an empoyee's exercise of his statutory right to have union representation in an interview in which the employee reasonably believes disciplinary action may result, may nonetheless not interfere with legitimate employer prerogatives; and that the employer need not justify his refusal and may leave to the employee the choice between having an interview unaccompanied by his representatives of having no interview at all, and thus forego any benefits that might be derived from such interview. It would appear no longer to be an arguable case application under the Board's *Certified Grocers* holding, that an employer's representative, after conducting an investigatory interview, would, after a refusal of an employee's request for a union representative's presence, violate Section 8(a)(1), in the act of continuing the discourse solely to the extent of informing the employee of discipline then and there determined. Such would appear to be fair import or extension of the Board's recent holding in *Baton Rouge Water Works Company,* 246 NLRB No. 161 (1979).

However, that is still not quite the situation presented here. Rather, I have found that here it is reasonably to be concluded that an investigatory portion of the interview was first freely engaged in by Vale and completed in his telling his superiors what he did and why he did it; and it only then indicated by Kupec that Vale was to be suspended. Of course, Vale was then put on notice that disciplinary action might be forthcoming, indeed in the circumstances of this case, even immediately indicated as likely to be in the form of a suspension of some length. It is clear as well that it was only after committeeman

assistance was denied Vale, that Vale then sought on his own to urge alternatives to discipline by suspension. It was, however, only interim suspension that Vale was awarded pending actual disciplinary evaluation. The question thus presented is, at that point of announced interim suspension did the Respondent violate the law by continuing any discussion with Vale after Vale's request was then made and denied, or in those circumstances, by failing to continue the interview with the union representative present for the discussion of such alternatives on the discipline to be imposed, or otherwise. As I read the Supreme Court's holding in *Weingarten* and the Board's subsequent holding thereunder as urged by General Counsel in the *Certified Grocers* case, and the majority holding in *Baton Rouge Water Works, supra,* there is no distinction to be had in regard to an employee's right to request his representative be present in an interview from which he has reason to believe discipline may emanate, whether the interview be in nature investigatory or in nature one he is forewarned is for actual imposition of discipline. There *would* appear to remain clear distinction under those holdings, on the one hand, between the employee's right (if so presented by the employer) to choose between electing to have an interview without representation or have no interview at all, and on the other hand, advanced claim by employee of right to an interview, or continued interview once started. Thus the employee would not appear under either holding above to have right to compel either type interview with representation any more than the employer has management right, in view of the import of Section 7 of the Act as elucidated by the Supreme Court and the Board to compel either type interview without representation except solely to deliver discipline already reached. Here we are taken along some-

what further to the question, once the principals have proceeded with an interview (in nature initially investigatory) and facts gained to the point future discipline is then indicated by the Employer, a request for a representative's presence is then made and denied, can the employee claim right or compel a continuation of that interview for any purpose. I do not think so. Nor do I think Respondent has effectively imposed a more extensive interview in this case beyond earlier award of interim suspension. While Vale is observed to have then sought representation and also to have a further discussion with his Employer as to the type discipline appropriately then to be awarded, in my view, Respondent did no more than effectively cut that discourse off for its own evaluation of the appropriate discipline ultimately to be awarded. I thus view this case as controlled by *Weingarten's* explicated management right that an employer in the face of such an employee request may hold out for an interview with the employee without union representative presence or provide the employee with choice of no interview at all, as also encompassing employer prerogative to cut off any interview already started when employee request is made and it has denied it; as has been seemingly earlier indicated is the case in Board holding in *United States Postal Service,* 241 NLRB No. 18 (1979), in regard to the investigatory interview, and in *Amoco Oil Company,* 238 NLRB No. 84 (1978), in regard to discipline interview. Accordingly, I shall recommend that this complaint allegation be dismissed as well, in any event.

Conclusions of Law

1. Van Dorn Plastic Machinery Co., Division of Van Dorn Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By Vice President William P. Sheffield interrogation of an employee about the status of an upcoming strike vote and simultaneous urging that the strike not be supported by employees, the Respondent has engaged in conduct constituting interference with Section 7 rights, and in violation of Section 8(a)(1) of the Act.

4. By Foreman Valdis Kaminskis telling an employee that the Respondent's President Sam Smith had said in a meeting that he would not recognize the Union; that they didn't have to go out on strike, that President Smith would never recognize the Union; and also in substance and effect that it would be useless for employees to go out on strike, that thereby the Respondent has coerced and restrained employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

5. There is merit to Respondent's contention for an application of current Board precedent as contained in *General Knit of California, supra* (and its forbear *Hollywood Ceramics Company, Inc., supra*) in respect to Employer's allegation that certain union misrepresentations had a significant impact on results of election as contained in Objection 8; and application of said standard would appear to raise circumstances such as would warrant the Board to reconsider its prior certification of the Union.[43]

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43. It has been noted earlier that the underlying representation case No. 8-RC-10830 has not been consolidated with this unfair labor practice proceeding. Assuming *arguendo,* that on that account, or otherwise, that I have lacked authority to presently fail to give full effect to the earlier certification, the Board itself will suffer from no such infirmity. However, assuming concurrence in and adoption of the findings and conclusions (otherwise) reached on the wage discrepancies found herein as appearing to constitute substantial misrepresentations having a

(Continued on following page)

6. Respondent has not otherwise engaged in conduct in violation of the Act as alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[44]

Footnote continued—
significant impact on results of election under the *Hollywood Ceramics* standard by virtue of its *General Knit* holding, the Board may now wish to consolidate the representation proceeding in Case No. 8-RC-10830 herewith; to vacate prior proceedings therein, and direct the Regional Director, Region 8, to hold a second election in that proceeding as appropriate, *Steel Equipment Company*, 140 NLRB 1158 (1963); *Western Health Facilities, Inc.*, 208 NLRB 56, 57 (1974). However, in the event I have in some aspect of reasoning inadvertently erred, either in the addressment or in the evaluation of the misrepresentations under *General Knit's* effect in this matter, and thus resultingly in conclusion that the Respondent herein was not under a legal obligation to bargain with the Union during material times, then I would conclude and recommend on this record that the Respondent has violated Section 8(a)(5) not only in refusing to bargain with the Union since February 22, but since March 22 in refusal of requested material data; and by earlier failure to bargain with the Union about the effects on unit employees of its changes in paid lunch policy; but not by any alleged unilateral implementation of a new absentee control program based upon a point system. Nor would I recommend finding that Respondent violated Section 8(a)(1) in regard to the alleged denial to Vale of union representation at interview. I would, however, recommend finding that the letter of President Smith was in such circumstance, additionally violative of Section 8(a)(1).

44. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning the status of a strike vote and urging employees not to support a strike.

(b) Telling our employees that we will never recognize the Union and that it would be useless for employees to go out on strike.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its plant in Strongsville, Ohio, copies of the attached notice marked "Appendix."[45] Copies of the notice on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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45. In the event that the Board's order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the Regional Director, in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D. C. March 31, 1980

/s/ ROBERT G. ROMANO
Robert G. Romano
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

VAN DORN PLASTIC MACHINERY CO.
DIVISION OF VAN DORN COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone No. (216) 522-3126.

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE OF THE NATIONAL LABOR RELATIONS BOARD

(Dated May 18, 1981)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VAN DORN PLASTIC MACHINERY CO.
DIVISION OF VAN DORN COMPANY

and — Case Nos. 8-CA-11669
8-CA-11842

DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO — 8-CA-12243

and — Case No. 8-CA-12205

THOMAS W. VALE, an Individual

John A. Simonetti, Esq., for the General Counsel, and appearing in this Supplemental proceeding as Counsel for the Regional Office (Regional Director).

Robert L. Larson, Keith A. Ashmus and Gregory A. Jacobs, Esqs. (*Thompson, Hine and Flory*) of Cleveland, OH, for the Respondent-Employer.

Mr. Thomas Vale, of Litchfield, OH, an Individual Charging Party.

SUPPLEMENTAL DECISION

Statement of the Supplemental Proceeding

ROBERT G. ROMANO, Administrative Law Judge: This supplemental proceeding came on for hearing on January 21-22, 1981, as a result of Board Order Remanding Proceeding[1] for further hearing on Objection 8 timely filed by the Employer in the underlying representation case[2] and for a supplemental decision. In affirming that its holding in *General Knit of California, Inc.*,[3] was to be controlling herein rather than its prior applied (and now overruled) *Shopping Kart Food Market, Inc.*,[4] holding under which Employer's Objection 8 had hitherto been determined nonmeritorious, the Board opined that there existed material issues of fact and law concerning the Employer's Objection 8 which warranted the remand for the purpose of conducting a further hearing with regard to Respondent-Employer's Objection 8 in Case No. 8-RC-10830 in the light of the present application to be made of the Board's *General Knit*, holding to that matter. It was also directed that: "At the hearing, all parties shall be allowed to adduce whatever evidence they deem pertinent on that objection."

Upon the entire record including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the Respondent-Employer and by the Charging Party-Petitioner Union, on or about February 27,

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1. 253 NLRB No. 29.

2. Case No. 8-RC-10830.

3. 239 NLRB 619 (1978) (Members Penello and Murphy dissenting).

4. 228 NLRB No. 190 (1977) (Members Fanning and Jenkins dissenting).

1981, and of Reply Brief by the Union on March 16, 1981,[5] I make the following:

Findings of Fact

I. Broadview of the election campaign

A. *The Time frame.*

On March 3, 1977 the Union filed its petition for an election in Case No. 8-RC-10830. Thereafter, on March 15, the Union and the Employer entered into a Stipulation for Certification Upon Consent Election which provided for an election to be held in an essentially stipulated production and maintenance unit at Employer's Strongsville, Ohio plant.[6] The election was to commence at 6:30 a.m. on Friday, April 22, 1977. During the course of the campaign and for prevote consideration of the employees, both Em-

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5. At the outset of the hearing counsel earlier appearing for the General Counsel took the position that inasmuch as the matter remanded for hearing related solely to an objection to election, his appearance would be limited to participating as counsel for the Regional Director. All parties concede and the record fairly reflects that counsel for the Regional Director did not thereafter take an advocacy position. Apparently in keeping therewith, the latter has not filed brief on the matter remanded and now heard. The Union's post-hearing Motion To Reopen Record, filed February 23, 1981, for the receipt of a certain affidavit of Clarence Davis dated May 19, 1977, to which Respondent Employer has filed opposition on February 25, 1981, is *denied,* for reasons explicated in the section entitled the procedural question, *infra.* The rejected affidavit, will however, be placed in a rejected exhibit file. The Union's further Motion To File Reply Brief Instanter is granted; and said brief is received as a matter within my sound discretion. It has been subsequently fully considered, excepting only as to its renewed broachment of the subject of the affidavit of Davis dated May 19, *supra,* a matter rejected and herein not relied on.

6. At time of election Employer had additional plants at Cleveland, Ohio and Indianapolis, Indiana. The material Strongsville plant manufactured plastic injection molding machinery (capital equipment).

ployer and the Union distributed several pamphlets and/or leaflets (herein simply leaflets) to employees, including leaflets that set forth various comparisons in regard to the wage rates and fringe benefits that Employer paid its employees, as compared with wages and benefits which were paid by other employers to their employees, some of whom were represented by the International Association of Machinists and Aerospace Workers, AFL-CIO (herein I.A.M.) and certain of the latter's District and/or Local Lodges.

B. *The election campaign background to the Union's disputed leaflet*

Insofar as the record reveals, a leaflet entitled "Let's Compare Van Dorn Performance vs. I.A.M. Promises,", was prepared and distributed to employees initially by Employer on or about March 23, 1977. This leaflet invited a comparison to be made by employees of the existing Van Dorn wage and benefit program with that of an asserted (but unidentified) major competitor whose production employees are represented by the I.A.M. (The union actually recognized and signatory thereto is I.A.M. Local 1319, unaffiliated with District 54.) The leaflet did not identify the competitor, nor reveal the plant's location, though an Employer internal document dated March 23 addressed to Employer's foremen identified the competitor to them as being HPM. The Employer's March 23 leaflet also laid claim *inter alia* to Van Dorn then having the highest wages in the industry at $6.69 average hourly rate, as compared with competitor's $5.50; Employer providing monthly cost-of-living adjustments, versus competitor's lack of provision for same; Employer's providing shift premium differentials of 22¢ for second shift and 25¢ third shift, versus competitor's 12¢ provided for second shift, 15¢ third shift; and Employer's pension plan provid-

ing $7.50 (benefit) per year of credited service versus competitor's graduated benefit of $4 through $7 over the years 1970-76 to expiration of agreement.

It was stipulated that the statements and figures as stated were true. However, the leaflet did not recite that the competitor's contract also provided for a minimum monthly pension benefit of $80 for participating employees employed as of April 30, 1971 (which Employer's plan did not). Nor did the leaflet mention that employees' balances in a preexisting profit sharing plan, as to which the competitor's contributions had been discontinued with the advent of the pension plan, were still continued for employees, with guaranteed dividend. David C. Bragg, Employer's Director, Employee Relations whose responsibility it was to develop and direct the campaign for Employer testified that he had not at the time inquired of that Employer about a profit sharing plan. Bragg without contradiction, otherwise testified that Employer's foremen were under general instruction to distribute Employer's campaign leaflets promptly upon receipt. Bragg also testified without contradiction that the HPM plant was its closest major (I.A.M.) competitor. I thus find the said leaflet was distributed on, or about March 23, 1977, and that HPM was Employer's closest major competitor whose employees were represented by the I.A.M.

The Union has introduced evidence which I also find convincing in support of its contentions that the referenced HPM plant was located in a rural area (Morrow County, Ohio) where wages are generally and significantly lower than in the industrialized area (Cuyahoga County) in which Employer's Strongsville, Ohio plant is located. Thus the Union has convincingly established that the referenced HPM plant is located in Mt. Gilead, Ohio; and that Mt.

Gilead is the county seat of Morrow County. In 1977, there were 341 Employer units that reported under Ohio Unemployment Compensation Laws (O.U.C.L.) in Morrow County, as compared with 31,029 Employer units reporting in Cuyahoga County. In 1977, Morrow County had an average of approximately 4,000 workers covered under the O.U.C.L., while Cuyahoga County had in excess of an average of 718,000 workers covered during the same period. During 1977, the average weekly earnings for a worker in Morrow County was $182.28, as compared with average weekly earnings for a worker in Cuyahoga County of $252.76 (over 38.6 percent higher). The average worker in manufacturing in Morrow County during 1977 earned $223.94 per week, as compared with the average worker in manufacturing in Cuyahoga County who in the same period earned $317.58 per week (over 41.8 percent higher). However, in the more specific category covering the Employer's operation, *viz.*, "other machinery, except electrical", average weekly earnings in Morrow County was $275.74, and in Cuyahoga County $311.01. Thus $35.27 more, and consequently observed to appear to be but 12.7 percent higher in Cuyahoga County.[7] Nonetheless, I find that Employer's referenced major competitor (HPM) is located in a substantially rural county in Ohio as compared with Employer's plant located in a substantially industrial county in Ohio; and that average weekly earnings of a worker, and of manufacturing workers in the rural county, were substantially less than the average paid similar such workers in the industrialized county in which Employer's Strongsville (Cuyahoga County), Ohio plant is

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7. The figures are based upon credited testimony of David Kinkoff, Labor Market Analyst for the Cleveland District of the Ohio Bureau of Employment Services, with supporting documentary compilations in regard to reported employer payrolls and contributions, and workers covered under O.U.C.L.

located, though not as significantly in Employer's seeming more precise industrial category.

Davis also testified that after he became aware of Employer's March 23 leaflet, he made inquiry of other I.A.M. business representatives and staff concerning the identity of that major competitor but that no one he questioned was able to identify it (HPM) for him at the time. Davis also testified that it was not until union counsel in the instant proceeding had determined the competitor was HPM (through inquiry on a strike reference) that Davis first learned of the identity of the referenced major competitor being HPM.[8]

The record reveals, and I find, that on or about April 4, 1977, Employer next distributed a three-page leaflet, the first two pages of which are in form a cover letter to all employees from Employer's President, and the third page of which is a described attachment entitled *"Maximum Wage Rates Survey."* Employer's April 4 leaflet presents for comparison purported wages paid by seven companies with the wages paid by Employer to its employees, in *six* stated classifications (including one Employer has there shown as being "Toolmaker 'A' "), and as to two certain other aspects of the pay of employees, *viz.*, average straight time hourly rate, and cost-of-living adjustment. The seven companies thus compared were named in the first page of the Employer's cover letter. They are there identified as being: "Motch & Merryweather; Warner and Swasey; Anderson IBEC; McDowell Wellman; HPM; Lester Engineering; and Improved Machinery Company (IMPCO)." However, the seven com-

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8. Employer's March 23 leaflet had stated *inter alia* that there had been two 13-week strikes in the past 6 years at the competitor; and that the Union representing the employees there was the I.A.M.

panies were not identified by name with the specific wage rates presented in the attachment, but rather there a letter designation for the individual company paying the rates was utilized.[9] In the cover letter the employees were told that the attached survey was one conducted in June, 1976. However, the same cover letter did go on to tell employees "Right now, you have higher base wage rates than the I.A.M. has been able to get for the employees of these companies— . . ." The compared companies were otherwise grouped in the attachment for comparisons as follows: four companies (identified as being Company A, B, C and D) under subcaption of Machine Shop and Assembly Wage Rates and elsewhere stated to employ employees represented by the I.A.M.; two companies (identified as Company E and F) under subcaption of Direct Competitors, without reference to I.A.M. representation; and one company (G) shown as a direct competitor represented by the I.A.M. In the April 4 leaflet attachment (survey); "Company B" is portrayed as behind Employer on each of the six jobs in amounts ranging from 14-cents per hour to 97-cents per hour. In that regard the Union established that Employer's April 4 leaflet's reflected rates at Company B (herein identified to be Warner & Swasey) did not reveal that there was also an incentive plan there. Thus, the leaflet did not specify that certain of the rates were non-incentive and in effect as of 12/75 (and thus as of June,

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9. Bragg testified an identification of the companies with specific wage rates paid was not shown at the time in order to preserve the confidentiality of the companies' survey responses to Employer. In that regard Bragg at hearing herein has further testified that he was unable to match A-D or E-F companies to presented wages without company records. In passing it may also be appropriately observed that both of Employer's March 23 and April 4 leaflets would have been distributed by Employer to its employees prior to initial *Shopping Kart*, case, *supra*, issuance, the latter having been initially decided by the Board on April 8, 1977.

1976), and did not reflect September, 1976 (contractual) non-incentive rates which were 50¢ higher. I further conclude and find on the weight of the evidence presented herein, that a present wage comparison was made by Employer in its April 4 leaflet.

The Union thus by convincing contractual evidence and credible testimony proves that "Company B" is portrayed as behind Employer on each of the six jobs in amounts ranging from 14-cents per hour to 97-cents per hour, whereas at that time, April, 1977, Company B was paying (maximum) rates 5-cents below to 37-cents *above* Van Dorn for three (non-incentive) jobs, and that employees, in the other three (incentive) jobs would have been then receiving as their maximum wage rate: $.87, $1.17, and $1.49 per hour above Employer's rates in regard to the three "B" (incentive) jobs.[10]

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10. Employer would have it noted that the rates were presented to employees as based on the survey conducted in 1976; and it contends the rates (which are essentially accurate as of that time) were reported by the surveyed companies as being the rates in effect at the time of the survey. The Union by contrast, would have considered the following facts as to this leaflet's preparation and content, and particularly as to the portrayed Company B. The Warner & Swasey Cleveland facility (Company B) covered a bargaining unit of 900 employees at three locations. It has a wage incentive plan not mentioned in the survey. That "Wage Incentive Plan" provided for an uncapped incentive, and specifically provided that "it should be possible for an experienced and skilled employee working at incentive performance to achieve 130-percent net efficiency, and thus receive incentive pay equal to 30-percent of his job base rate." Witness Edmund Zaller, another District 54 Business Representative who has serviced Warner & Swasey since 1970, further testified, credibly, that his own experience was that the average employees in the incentive classifications at Warner-Swasey had actually earned between 20-percent and 30-percent over their base rate. The Union established that three of the (six) classifications listed in Employer's leaflet unquestionably were on incentive though not shown as such. On basis of a 30-percent incentive factor

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In explanation of the leaflet's referenced survey, Bragg testified credibly that the Employer in conducting its survey had not asked anything on incentive plans, confirmed that any wage incentive plans were not reflected in the survey; and that the survey as conducted in June, 1976 was not one prepared for the instant matter. However, the Union persuasively has argued that even though the leaflet has reference to the 1976 survey, the leaflet *was* used in the present campaign for a *present* wage comparison; and that the ascertainable wage *facts as to Company B were not as of then presented accurately* in not taking into account interim contractual increases, and the existing contractual provisions for incentive pay.[11]

Footnote continued—

increase (seemingly properly to be considered in any comparison of a stated maximum wage rate, given incentive rate consideration is to be made), the referenced classification "Boring Mill Operator-'A'" rate (as of April, 1977) was then understated by $1.84; "Elec. Assembly 'A'" by $1.92; and "Mach. Assembly 'A'" by $1.84. The Union would have it further noted that the Employer had also used labor grade 9 as the maximum rate for an inspector (non-incentive) job although Warner-Swasey (Company B) "Inspection" job classifications at labor grade 10, and one "Inspection" classification at labor grade 12. Union's above rate comparison apparently already utilized maximum inspection rate (Labor Grade 12).

11. Thus the Union argues: the April 4 leaflet speaks in terms of an urged comparison of present rates, to wit: "Right now, you have higher base wage rates than the I.A.M. has been able to get for the employees of these companies . . ."; and it thus argues that Employer should have clearly indicated on the leaflet that the rates for Company B (and others) were rates in effect in June, 1976, but did not; and argues the fact that the survey was conducted in June, 1976 (presumably when used in 1977) does not mean that it related only to June, 1976 rates, since collective-bargaining agreement rates are often available far in advance. Base wage rates as effective in April, 1977, for Warner & Swasey, Anderson IBEC, HPM, and Nelson Stud Welding Company were all established by contract terms in 1974 and 1975 and thus available at the time. Finally, Union shows Employer's April 4 leaflet misrepresented the applicable wage rates, even as they existed in June, 1976, pointedly with regard to the incentive jobs at Warner & Swasey.

The Union also introduced the Anderson IBEC contract which established IBEC as the compared Company "A." Again the April 4 leaflet had set forth (maximum) rates shown by contract, but only as in effect from September 1, 1975 to September 1, 1976. However, on the latter date the pertinent contract reflects there was an across-the-board 50-cents per hour increase on all labor grades and job classifications at IBEC. The Union also would note Employer's April 4 leaflet used the "Tool and Gauge maker" wage rate of that contract for comparison with "Toolmaker 'A' ", while ignoring a higher paying "Tool and Die Maker" job classification in the contract. Although utility rate under that contract was transcribed erroneously in leaflet as $5.96 (instead of contractual $5.595) it notably remains below the applicable September 1, 1976 rate of $6.095.

Employer's April 4 letter (in apparent response to prior union leaflet electioneering) also told the employees that there was "no obligation on the part of the Employer to continue all existing benefits." On or about April 13 the Union distributed a leaflet (with typed date of "April 13, 1977" appearing thereon), setting forth the Union's claimed advantages for the employees' membership in the *I.A.M.*: in claimed union muscle (or strength), asserted as coming from I.A.M.'s Organization, Experience, Skill, Resources and Spirit.[12]

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12. As deemed material to issues herein this leaflet was captioned under letterhead of District 54 and authored by present 54 officials, including Davis as Organizer and Ed Moss, Secretary-Treasurer. However, as in prior Employer leaflets there are *repetitious* references *to the I.A.M.* in the claims made. Thus, in regard to *Organization,* the Union informed employees specifically "across the United States and Canada, a million I.A.M. members are organized in Local Lodges, Districts, in State Councils and in corporation-wide and industry wide conferences."; set forth the Union's claim of *Experience* "with every kind of

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According to the recollection of witness Bragg (and the same being one notably appearing as *uncontested* by the Union), the Union distributed another leaflet on Monday or Tuesday, April 18 or 19 which addressed (1) its claim that employees employed at Employer's (then) East 79th Street (Cleveland) plant, represented by the UAW and its Local 346, had wages and benefits under their obtained collective-bargaining contract with Employer which Employer's Strongsville employees did not have[13] (2) a union reply on the compared IBEC wages, in the form of excerpts from a new I.A.M.-IBEC agreement with asserted inclusion of ". . . some of their agreement, along with some other International Machinists negotiated rates;[14] (3)

Footnote continued—

employer"; claimed *Skill* based on "More than 800 I.A.M. Representatives who know the ropes . . ."; and asserted, following described *Resources* (including reference to a Research Department) that "More than 97 percent of the I.A.M. contracts are negotiated peacefully without any interruption of work."

13. Excerpts were presented (in copy appearance of their contractual form) in support on various aspects of subjects of Discharges; Severance Pay; Medical Attention, Health and Safety; Insurance (Blue Cross); Strikes and Lockouts, Seniority and Stewards.

14. Anderson IBEC makes rubber extrusion machinery; and the Anderson IBEC plant is located in the same Industrial Parkway, about a quarter of a mile from Employer. I.A.M. Local No. 2155, a Local Lodge within District Lodge 54, has a collective-bargaining contract covering the employees of Anderson IBEC. Contract excerpts presented: identified the Union as the I.A.M. and its Local Lodge No. 2155; set forth with specificity the some *ninety* odd jobs covered by that contract with classifications in labor grades 2-10; and with the minimum and maximum rates by labor grade and with identified time effective. Included therein specifically were rates for classification of Tool and Die Maker, under Labor Grade 3 showing what the span rate would be as of *September 1, 1977* $7.13-$7.46 (and what it would be for subsequent contractual periods). Similar information was provided for Horizontal and Vertical Boring Mill Operator (Labor Grades 4 and 5, respectively), as well, as noted, for all other classifications. District 54 was thus able to effectively present its response in regard to IBEC, which was a company nearby, within its jurisdiction and under contract with it. HPM had none of these characteristics.

employee notification by the Union that it was against the law for Employer to say that it would take benefits away and accusation "but their clever ghost writer lets you assume that you may lose them"; and (4) a presentment of the Union's general claim that Employer had made many false and misleading statements to confuse the employees with related presentment of a purported article from the Wall Street Journal *in regard* to the Board's (then) recent *Shopping Kart* ruling, and with purported Board member comments thereon. The Union, in brief, would have noted that the article's subheading is "Representation Campaign Statements Won't Rate Intervention by the Board"; but asserts it used the article to let employees know that Van Dorn cannot say that it will take away benefits if the Union is elected. In that connection Employer would have presently observed as being material, what I find factually reasonably appears to have been the case, that in the Wall Street Journal article excerpt the Union placed two small paste on strips reading "Vote Yes for the I.A.M." in such manner as to warrant conclusion it desired to interdict a clear reading by employees of the article's mention of the Union official's conduct which was charged as objectionable in the *Shopping Kart* case. However, it also bears present noting that it was otherwise uniquely reported to employees participating in *this* election, tersely, but saliently, the prevailing views of *Shopping Kart's* majority-minority conflicting rationales in regard to the effect of party election misrepresentations, *viz.*, that Board Members Penello and Walther (identified as being in the majority) were of the view as essentially expressed in *Shopping Kart* and so reported in the article, that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it," and the "minority Board members, (Fanning and Jenkins, Jr.)"

contra-view that the majority's *Shopping Kart* holding would set an "almost-anything-goes" standard, the latter members reported as adding that misrepresentation resulting, "will tend to drive out the responsible statement."

C. *The Disputed Union Flyer*

1. Material Content

The Union's flyer in issue and as received in evidence is observed intially to have been composed of *four* pages, only two of which (as heretofore noted) are deemed material to the issues.[15] The first page is in form a union cover letter addressed to Van Dorn Employees; and it bears letterhead of the Union herein, *viz,*. International Association of Machinists and Aerospace Workers, *District 54* with typed authorship shown as being (again) that of Organizer Davis and Secretary-Treasurer Moss. (Moss did not testify in this proceeding.) The letter initially makes reference to an earlier Employer pamphlet entitled Van Dorn verses (sic) the Machinists;[16] and asserts that pamphlet ". . . was distorted and twisted the truth." The cover letter went on, *inter alia,* to provide:

> B. The plant that was supposed to have I.A.M. negotiated rates show no location or identification of area rates.

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15. The flyer, both in its preparation form (except as discussed *infra*) and its distribution form, is in evidence. The extent of the other pages relevancy is that the last page thereof was, a corporate letter of Employer addressed to Investors, the content of which was used by the Union in support of certain union raised claim advanced as to the profit status of Employer's operation. (The other page is one composed of excerpted (and taped) collection of disciplinary provisions from Employer's employee manual.)

16. The reference (I find) was to the Employer's March 23 leaflet entitled "Let's Compare . . . Van Dorn Performance vs. I.A.M. Promises."

C. Van Dorn wage and benefits were duplications of the one given out in 1974 with no improvements.

D. Van Dorn profits have increased immensely since 1974.

As a result of many mistatements and omissions we have decided to fill in the spaces left vacant by the Company. I have attached some rates and language from one *of our* I.A.M. & A.W. contracts (sic) these rates are in effect until April 30th, when a new *contract* will be negotiated . . ." (italics in original).

As noted the Union's original composition of this page of the leaflet is in evidence; as is the contract on which it is purportedly based. The page as composed is constituted of an 8½" x 11" sheet of paper on which appears:

(a) an excerpt cutting from that contract's preamble which (actually) provided:

> Between *Nelson Stud Welding Company* party of the first part, and hereinafter referred to as "The Employer," and the INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, and its affiliated Local Lodges signatory to this Agreement, party of the second part hereinafter referred to as "The Union."

(b) Fourteen numbered and typed classifications to the left of the page with stated wage rates appearing to the right (*infra*)

(c) An excerpt cutting of a pension provision placed diagonally essentially between the above typed classifications and wages (discussed *infra*) but in such manner as to allow only the following of the Union's name in (a) above to appear "International A------tion of Machinists & Aerospace Workers, AFL-CIO, District Lodge 1-- --- -ts affiliated Local Lodges signatory to this Agreement . . ."[17]

(d) Appearing immediately below (a) above in original leaflet page composition was the following *typed* information.

1.	Tool and Die Make(rs)[18]	$10.78
2.	Tool and Die Machin(ists)	$9.78
3.	Senior Electronics Te(ch.)	$9.88
4.	Electronic Tech.	$9.47
5.	Maintenance Machinist	$9.76
6.	Maintenance Welder	$9.76
7.	Journeyman Machinist	$9.03
8.	Journeyman Welder	$9.03
9.	Automatic Screw Machinist	$9.13
10.	Journeyman Painter	$9.04
11.	Die Setter and Adjuster	$8.27
12.	Specialist	$7.71
13.	Tool Crib Attendant	$7.71
14.	Shop Janitor	$6.91

17. In the original pasteup the first 1 of District Lodge 115 is fairly discernible. In the addressograph copy made thereof for distribution, the initial 1 is considerably less discernible.

18. Matter shown in parentheses was also obstructed from view by the above diagonal pension insert.

(e) The remainder of this original page reveals two other excerpts from the contract, *viz.* "*Section 8 Pay for Set-up Man, Leadman, Instructors*"; and then "*Section 3.* Study of Job Evaluation for Manufacturing Concerns.:"

2. Composition by Davis; and Comparison with Nelson Stud contract terms.

It is undisputed that Employer utilizes job classifications, but has no job descriptions. Davis contacted the I.A.M.'s Research Department and asked for a copy of a collective-bargaining agreement that listed a lot of machinist classifications and that had decent or good wages. Davis testified that it was by Monday, April 18, 1977, approximately 1-2 weeks after he had placed the call that he had received from the I.A.M. Research Department a copy of the collective-bargaining agreement between the Nelson Stud Welding Company and District Lodge No. 115, International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Local Lodges, hereinafter the Nelson Stud (or California) contract. It thus appears more likely than not, that it was after Employer's distribution of both the March 23 *and* April 4 leaflets that Davis made his request of the Union's Research Department.

According to Davis upon receipt he quickly reviewed the Nelson Stud contract and prepared the leaflet which is now in dispute. Davis relates he first excerpted the contract's introductory paragraph, the contractual section on set-up men, leadmen and instructors, and the section concerning established procedures for implementing job evaluation programs. These he cut up and (scotch) taped on the composed (original) leaflet which was then to be duplicated by copy (addressograph) process. *He* also *se-*

lected certain classifications and calculated the rates according to the terms which were set forth in the contract. These he *typed* on the (original) leaflet sheet he was composing.

The Nelson Stud contract sets forth wage rates for day shift, second shift (including premium), and third shift (including premium) for some 26 *base* classifications (including helpers).

Davis selected 14 classifications and testified that he did so randomly. Analysis of the classifications that he selected as appearing on the leaflet with those as listed in the contract reveals that Davis selected the first 13 of the classifications listed in the contract though he omitted helper categories in the 5th-8th listed classifications; and he also omitted any reference to existence of the thirteenth classification (Tool Crib Attendant) selected as having an "A" (followed by a "B") rating.[19] The first 13 classifications selected were essentially the highest paid under the contract; and the fourteenth was the lowest paid. Although the leaflet presented the Nelson Stud wage spans as noted it essentially presented the higher paid classifications listed under the contract.[20]

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19. Maintenance Machinist *Helper*, Maintenance Welder *Helper*, General Machine Shop *Helper*, and Journeyman Welder *Helper* were thus omitted. The contract also reveals that the Maintenance Machinist- and Welder-Helpers were paid the same; and that the General Machine Shop- and Welder-Helpers, and Tool Crib Attendant "B" were paid 7¢ less, but otherwise the same. All five were in the same Rate progression Schedule (though along with Production Worker #2 and #1). Employer has a Tool Crib Attendant "A" classification, but no "B" Tool Crib worker classification. In substance and effect I find that in selecting the *first* 13 listed classifications, Davis essentially omitted the helper classifications.

20. Thus, the intervening and unselected classifications (in addition to the referenced Tool Crib Attendant "B") were:

(Continued on following page)

The Nelson Stud contract sets forth wage rates for the above classifications as they were effective on May 1, 1974 and through April 30, 1975; and it also sets forth a list of the increases that became effective on May 1, 1975, and on May 1, 1976. The annual increases varied in amount for given classification, and they also varied in amount from year to year. The contract also has a cost-of-living adjustment provision (computed quarterly). By calling California, Davis established that the cost-of-living increases received to date under the contract had then amounted to 83¢. In arriving at the wage rates for the classifications selected, Davis thus had to add the two specific annual increases to the initial rate shown for the specific classification, along with the total cost-of-living increases received to date under the contract. In the latter connection, an April cost-of-living adjustment was generated through pertinent consumer price index publication on April 21. Although by contract this wage increase of 9¢ was effective back to April 1, it was not shown by Davis in the wages he presented in the leaflet, though he had been advised it would be forthcoming soon.

As noted the Nelson Stud (California) contract sets forth wage rates for day shift, second shift (with an included premium) and third shift (with an included premium). The shift differentials were not uniform. Thus as

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Footnote continued—

Production Shop Die Setter and Machine Adjuster, and Specialist Painter, both however, paid the same as the 12th (Specialist) and 13th (Tool Crib Attendant ("A")) classifications; Die Caster, Pressure Molder paid *more* than 12th and 13th classifications; (but with initial three 20-day progressions during first 60 days and starting less); *Production Specialist paid the same as listed Specialist;* and Production Worker #2 and #1, paid substantially less (than Specialist), with #1 same as Shop Janitor.

provided by the contract the shift differentials also varied between classifications, though in overall range were of 17¢-26¢ for second shift over day shift, and 26¢-39¢ for third shift over day shift. Davis selected the second shift (premium included) rates for his portrayal in the leaflet. At hearing, Davis explained that he selected the second shift rates for portrayal because he believed Employer had a full second shift work force and a partial operation on third shift; and that he had selected the second shift rates for portrayal as a "kind of medium range." Employer has presented credible evidence, and I find, that as of election day there were 176 (eligible) employees employed on 1st day shift, 86 employed on 2nd shift and 35 on 3rd shift.

In the disputed union leaflet there is no clear notice, nor any indication afforded to employees that the wage rates being presented by the Union for comparison by employees of Employer were based in any part on wage rates (with premium included) applicable to 2nd shift employees under the Nelson Stud contract; and both Employer (and particularly in the March 23 letter to which the disputed leaflet was directed to respond) and the Union (in its prior comparisons offered employees) had presented day shift rates and/or shown separately shift premiums. With allowance of the 9¢ ("C.O.L.A."), uncalculated but then effective, the variance between the presented leaflet (unstated) 2nd shift rates and actual day shift rates was then 8¢-17¢ as may be observed from the following contractual calculations and leaflet comparison:

	1st shift 1974	1975	1976	COIA [sic] to date	Nelson Stud Contract Total	Established leaflet	Difference
Tool & Die Maker	8.47	.59	.63	.92	10.61	10.78	(.17)
Tool & Die Machinist	7.60	.53	.57	.92	9.62	9.78	(.16)
Senior Electronic Technician	7.68	.54	.58	.92	9.72	9.88	(.16)
Electronic Technician	7.34	.51	.55	.92	9.32	9.47	(.15)
Maintenance Machinist	7.60	.53	.57	.92	9.62	9.76	(.14)
Maintenance Welding	7.60	.53	.57	.92	9.62	9.76	(.14)
Journeyman Machinist	6.97	.49	.52	.92	8.90	9.03	(.13)
Journeyman Welder	6.97	.49	.52	.92	8.90	9.03	(.13)
Automatic Screw Machinist	7.05	.49	.53	.92	8.99	9.13	(.14)
Journeyman Painter	6.97	.49	.53	.92	8.91	9.04	(.13)
Die Setter and Adjuster[21]	6.33	.44	.47	.92	8.16	8.27	(.11)
Specialist	5.83	.41	.44	.92	7.60	7.71	(.11)
Tool Crib Attendant "A"	5.83	.41	.39	.92	7.55	7.71	(.16)
Shop Janitor	5.16	.36	.39	.92	6.83	6.91	(.08)

21. The contract actually describes this classification as Die Setter & Machine Adjuster A. (The variance is deemed insignificant as the contract makes no provision for a B category; and the Employer asserts it had no employees in Die Setter & Machine Adjuster A).

3. Other facts raised by the Parties

a. *The actual size of the Nelson Stud (California) bargaining unit, and related considerations.*

The actual size of the Nelson Stud bargaining unit was quite small (4) as compared with the number of employees in Employer's Strongsville bargaining unit. The contract was otherwise established by the Union to be in nature a standard agreement of I.A.M. District 115, which covered other substantial units.

Employer has thus established that there were but *four* employees actually employed by Nelson Stud Welding Company in its (San Leandro) California plant, or machine shop, as of the material election time. Record evidence convinces that those employees were classified as (1) Journeyman Machinist (though that individual employee was shown on seniority lists as occupying position of a leadman); (2) Automatic Screw Machinist; (3) Production Specialist; and (4) Production Worker #2. Employer would thus have it noted (and I find it to be so) that 12 of the 14 classifications presented to Employer's employees in the Union's disputed leaflet were not employed by Nelson Stud in its California Machine Shop. Employer would further have it noted as significant that two of the classifications (Production Specialist and Production Worker #2) which were employed by Nelson Stud and which it argues did have analogous classification in use at Employer's plant were omitted.[22]

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22. Employer has also contended that it did not have classifications analogous to the highest paid classifications presented in the leaflet; and also Employer (in brief) has urged that it be found that the Union admitted it did not even represent the two highest classifications of Tool and Die Maker (with stated wage rate of $10.78) and Tool and Die Machinist (with

(Continued on following page)

The Union has countered with contention and evidence offered in support thereof that the Nelson Stud (California) Independent Agreement was essentially a Master Independent Agreement negotiated by the I.A.M. District 115, which was in effect at approximately 275 San Francisco-Oakland area machine shops; that it closely tracked a California Metal Trades Association Master Agreement in effect at an additional 123-133 San Francisco-Oakland area machine shops; and that it was not an isolated agreement for a small plant but rather was (therefore in effect) District 115's standard machine shop agreement.

James F. Moran, a business representative for I.A.M. District Lodge 115 since 1975, testified credibly that there is a "Master Agreement" between the California Metal Trades Association (herein CMTA) and the I.A.M., I.A.M. District 115, and affiliated locals that sets an industry-wide pattern;[23] and that there are 113 companies listed

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Footnote continued—

stated wage rate of $9.78) based on (limited) testimony of union witness Moran. I decline to do so. As pointed out in Union's reply brief, witness Moran's testimony clearly was that these classifications were not represented by his union under the California Metal Trades Association (and they do not appear in such contract a copy of which is in evidence). The record clearly reveals they do appear in numerous Master Independent Agreements and Independent Agreements to which the I.A.M. and/or District 115 and/or Local Lodges are signatory (and a copy of which is in evidence). I am convinced the Union represents employees occupying such classifications. It is thus obvious here Employer has misconstrued the import of only certain of Moran's testimony and discounted other evidence of record. In passing, I similarly am not persuaded by contention that the two highest paid classifications do not have analogous classification in Employer's Strongsville plant, given the evidence of Employer's initial apparent willingness to call for some such comparison (at least as to its described Toolmaker "A") in its April 4 leaflet.

23. A copy of the (CMTA) Agreement in effect from April 1, 1974 until March 31, 1977 was received in evidence as a Union

(Continued on following page)

as signatories to the 1974-1977 CMTA with some 10 to 20 companies additionally signing it later. The bargaining units under the CMTA Master Agreement ranged from one-man shops to much larger units, such as an approximately 700 employee bargaining unit at the Schlage Lock Company.

Moran further testified credibly that after the CMTA is settled, District 115 puts together a Master Independent Agreement (herein MIA); and testified that the MIA closely follows the CMTA, excepting for changes made in those parts directly referring to the CMTA.[24] There are a few other differences, *viz.*, between the job classifications and wage rates set forth in the MIA and the CMTA. Thus MIA & IA *include* the job classifications of Tool & Die Maker and Tool & Die Machinist, whereas the CMTA agreement does not. Otherwise, the job classifications are identical. There are a few wage differences, MIA (and IA) being higher.

The pertinent Nelson Stud Welding Company agreement is an Independent Agreement, as opposed to an MIA. Moran explained that there are a group of agreements denominated "Independent Agreements" because they have some additional changes, usually very minor changes, from the MIA. Where changes are made in the Independent Agreement from the terms of the MIA they are then de-

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Footnote continued—

Exhibit (9). Employer contends that the said agreement is irrelevant to the issues in this proceeding. However I find that it has bearing on understanding subsequent I.A.M. District 115 negotiations that are relevant to the issues. It also bears upon the certain above contentions raised by Employer that two of the classifications shown in the Union's leaflet are not represented by District 115.

24. A copy of the I.A., in effect from May 1, 1974 until April 30, 1977 (a month later than CMTA) was also placed in evidence by the Union (8). The stated comparison is supported.

noted by the appearance of the signatory Company's name on a page where a change from the MIA is made. I find that the terms of the Nelson Stud contract in regard to job classifications, wage rates and other language as the same appeared in the Union's disputed leaflet are factually the same in substance base as are contained in the MIA, and reasonably so in many other independent Agreements.[25]

Moran thus testified credibly in regard to MIA and Independent Agreements that in 1977 there were approximately 200 companies covered under MIA, and that there were some 75 to 100 companies having a closely related Independent Agreement, which tended to be larger companies. Nonetheless, the Nelson Stud contract utilized covered but a small unit.

It is appropriate to presently note that the Union argues in regard to the unit size covered by the Nelson Stud Independent Agreement that it contains wage rates that were identical with approximately 275 (MIA and Independent) Agreements covering bargaining units of all different sizes, including bargaining unit equal to and larger than the Van Dorn bargaining unit. The Nelson Stud Welding Company agreement rates were also very close to the rates applicable under the CMTA which covered some 123 to 133 additional bargaining units of varying sizes. I find that Nelson Stud Welding Company agreement was not an isolated agreement for a small plant, but

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25. Of course the individual classifications and wage rates appearing in the Union's leaflet (as noted previously) were selected. wages were calculated from that base, and the selected classifications and calculated wages then typed. Moran further explicated the nature of companies covered by such agreements to be as follows: Most of the IA signatories were smaller companies with 150 or fewer employees in the bargaining unit. Signatory companies to Independent Agreements tended to be larger companies with bargaining units of 100 to 1500 employees, though the latter was not the case with Nelson Stud Welding Company.

rather was in nature essentially a standard machine shop agreement of District 115 in the San Francisco-Oakland area. I would only otherwise observe in passing in regard to the use by the Union of an *undisclosed* California contract that the Union would have it also noted that the average production employee in manufacturing industries in the Cleveland area earned $300.88 per week as of October 1977, compared with the $298.05 earned by such workers in that same period in the San Francisco-Oakland, California area.[26] Employer counters the average hourly earnings there exceeded Cleveland by 44¢. The two are able to stand compatibly by virtue of Cleveland workers averaging 2.9 more hours. Employer has made other contentions in regard to the specific selection and use of the Nelson Stud Independent Agreement.

b. *The San Leandro, California and Lorain, Ohio plants.*

John C. Presutti is employed by TRW Nelson Division as Director of Employee Relations with assigned responsibility for his employer's plants located, *inter alia,* in San Leandro, California and Lorain, Ohio where he is located. Presutti confirmed that the Independent Agreement existed between Nelson Stud Welding Company and I.A.M. District Lodge 115 and its affiliated Local Lodges, covering employees employed at his Employer's San Leandro, California plant. A copy of that contract delivered to Davis from the I.A.M. Research Department and obtained by employer from the Union pursuant to subpoena reveals that though it identifies the company in the introductory clause of the contract as Nelson Stud Welding Company,

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26. 1977 Labor Relations Yearbook, pp. 486-489 (BNA 1978)

it was executed on behalf of the employer by an official of TRW-Nelson Division.[27] Presutti also credibly testified that there existed another Agreement between Nelson Division of TRW, Inc. Lorain, Ohio and I.A.M. District Lodge No. 139 and its Local Lodge No. 1539. (I take judicial notice of the geographic location of the Lorain plant and Employer's Strongsville, Ohio plant as being in the general Cleveland, Ohio area.)[28] Presutti testified that at material times there had been 4 employees employed at San Leandro (California) plant (which had no second or third shift) and 167 employed at the Lorain (Ohio) plant. Employer established that no employee in the Lorain plant had a *base* rate higher than maintenance leadman at $5.41. The Union established that the C.O.L.A. at Lorain was not factored therein; nor shift premium. (The Lorain contract reveals that there was also an incentive plan with standards keyed so ". . . the average, qualified employee can perform the rate of twenty-five per cent (25%) above standard performance of one hundred per cent (100%).")

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27. Although Presutti has also testified that the Nelson Stud Agreement was under the CMTA Master Agreement and it is clear that certain benefits available to Nelson Stud employees were administered by CMTA-I.A.M. Joint Health & Welfare Trust; nonetheless to the extent Moran's testimony on the bargaining practices in regard to CMTA, MIA and the Independent Agreement differs from Presutti, I have credited Moran as Moran had longer experience therewith, while Presutti, as a division transferee, as clearly revealed of record, had more limited knowledge in such matters.

28. I thus take judicial notice that Lorain, Ohio, is located in Lorain County while Strongsville, Ohio is located in adjacent Cuyahoga County; and that both appear to be within a 30-mile radius of Cleveland, Ohio, though Lorain is located such to the west of Cleveland along Lake Erie, while Strongsville is located to the south of Cleveland. Presutti was responsible for apparently another plant nearby Lorain, at Elyria; and for several other plants located in Canada and other foreign countries. In contrast HPM was located in some 80-miles south of Strongsville. (Cf. *Standard Highway Mileage Guide, Rand McNally & Company,* pg. 430 (1973)). The Elyria plant was also apparently covered by the Lorain contract.

c. *The evidence conflict over date of distribution of the Union's disputed leaflet.*

The parties have their principal, indeed most glaring dispute over the date of distribution of the Union's leaflet, with the Union contending the leaflet was distributed on April 19th (Tuesday) and the Company contending it was distributed on April 21st.

Bragg testified on direct that it was his recollection that he received a copy of the Union's leaflet in issue in the afternoon of April 21. The stated basis for his recollection was that the Employer had passed out a flyer on the 21st and in response to that the I.A.M. organizers had handbilled at the plant between the first and second shifts. Bragg testified in that respect that the organizers passed out two flyers, the disputed leaflet and one in direct response to Employer's 21st leaflet.[29]

Bragg testified generally that normally a foreman would bring a copy of union literature to him when presented (distributed); and that they probably received the leaflet in question about 4 p.m. Bragg also testified that when he walked through the plant he had observed a lot of employees reading the leaflet; and that foremen also reported to him that employees were contacting them wanting to know if the rates were accurate. Bragg relates that at that point he sat down with the plant manager and with the personnel manager, Brian Gallagher. (Neither have testified in this proceeding in corroboration

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29. The President of Van Dorn gave a captive audience speech on April 20. The speech was also set out in a leaflet (and mailed to all employees), which was not offered in evidence. It is uncontested that Employer distributed another leaflet (dealing with sympathy strike) on the morning of Thursday, April 21, and that the Union prepared a leaflet in response thereto which was distributed in the afternoon of Thursday, April 21.

of Bragg.) According to Bragg they reviewed the document to try to formulate a response to it; and considered that the material presented appeared to them to be xeroxed excerpts from a contract which they did not have. They initially considered drafting a quick response to the Union's leaflet on the fact that the location was not identified, but they decided to try to track it down through Nelson Stud Welding to determine if the rates were accurate, since their response had to be verifiable.

Bragg relates that it was at this point close to 5 p.m. They contacted a sales office for Nelson Stud Welding through use of the telephone directory; and were given the phone number for the Lorain plant. However, by the time they called the number it was then after 5 p.m.; and they were only able to contact the guard service who advised that normal business hours were from 8 a.m. to 5 p.m. Third shift and first shift were scheduled to begin voting early the next day Friday, April 22, at 6:30 a.m., and they did not pursue it on Friday because of the conduct of the election.

On cross-examination Bragg testified further that he observed Davis and another unidentified person distributing flyers on April 21, but then acknowledged that he did not view the flyers personally and he did not receive a copy personally, Bragg also testified that he saw the union organizers passing out two items to the employees, handing them into a car through the window as the employees drove by; and that he had observed them from a window, not more than 25-foot away. On cross-examination Bragg otherwise acknowledged that he was primarily involved in the organization of the election campaign, that he was interviewed along with others by counsel as to Objection 8 and that he had no reason to believe the leaflet was distributed on the day of the election as was stated in Ob-

jection 8 and has admitted the same was incorrect. Bragg also acknowledged that he had observed the handbilling on April 21 for only a couple of minutes.

Significantly, in placing the Union's (Anderson IBEC) leaflet distribution on Monday or Tuesday, the 18th or 19th, Bragg testified in response to Union Counsel's questions on cross-examination as follows:

* * * * *

Q. When was that distributed?

A. I believe this was distributed on a Monday or Tuesday, the 18th or 19th.

Q. What is your belief based on?

A. Just my recollection is that this is when it came on.

Q. What do you base your recollection on?

A. The sequence of events that occurred that last week before the election day.

Q. Why don't you tell us that sequence of events?

A. Well, we were monitoring the information that was coming in and this is one of the items that came in early during the week. And I am not sure if it is anything that we responded to or not, quite frankly.

* * * * *

In the above connection it appears appropriate to presently observe that apart from thus placed IBEC leaflet, and apart from the disputed leaflet, the distribution date of which is in issue, the only other union leaflet shown distributed that week on Thursday, April 21.

Davis, with substantial corroboration by employees Vale and Davis Reichbaum (both of whom served on the Union's organizing committee) was categorical that the

last leaflet he distributed and the *only* union leaflet the Union had distributed on April *21* was the Union's leaflet hurriedly prepared that day in response to an Employer leaflet distributed that very morning (in regard to a sympathy strike with UAW); and that he distributed it, as he usually did, in the driveway 100-feet or more away from the nearest building; starting (as usual) a little before 2 p.m.[30] Employee Reichbaum testified, without contradiction, that (after 3 p.m.) he also had distributed this leaflet; that it was the only one distributed; and that he had approached closer and had been met by Gallagher (personnel manager) when he did, that Gallagher had told him to leave the Company property which he did; *and* that he (Reichbaum) had on that occasion actually handed Gallagher a copy of the leaflet they were handing out. (As noted Gallagher did not testify, and Reichbaum's above testimony thus stands uncontradicted).

Davis otherwise testified that to the best of his recollection he gave the disputed leaflet out on Tuesday, April 19. Davis based his testimony in part on his own recollection of circumstances of the leaflet's preparation and distribution. Thus he recalled that he had had to wait for 1-2 weeks for the research department to get the information to him; related that he had worked on it Monday; and that he finished it on Tuesday and wanted to make sure it was the last handbill they were going to hand out.[31]

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30. The Union's leaflet answered *inter alia* that only Strongsville plant employees vote on stopping work and provided: "We do not assist or have sympathy strikes."

31. Davis initially testified the Research Department's contract came in towards the end of the week and that he didn't have a chance to digest the whole contract because he wanted to make sure he had it out early the next week. Davis later clarified that when he came to the office Monday the Nelson Stud contract was (already) there and he had started working on it that Monday so he could get the leaflet out Tuesday. Although perhaps not totally consistent, neither is his testimony thereon deemed dispositively inconsistent.

In that regard he related specific recollection that as he was handbilling, he remembered saying to the others (handbilling) that the (disputed) leaflet was the last handbill they were going to give out before the election, though as it turned out it was not to be the last.

Bragg has testified that he didn't become aware that the Union's leaflet actually related to a California plant until during the investigation of the Objections that the Employer filed which was on the basis of comparison of the leaflet with the Lorain, Ohio contract. In its Objections, *viz.*, Objection 8, as initially filed, the Employer has alleged that it was "On the day of the election . . ." (Friday, April 22, 1977) the Union distributed a flyer:

> . . . containing what purported to be a copy of one of the Union's contracts, containing provisions for wage rates for various job classifications, pension and premium pay . . . . In fact, such "contract" was a forgery in that there are no provisions for set-up, leadmen, or instructional premiums.

Employer presented to the Regional Office in support of Objection 8, a copy of a Nelson Stud Division of TRW, Inc. (Lorain, Ohio) agreement. Bragg asserts that they had every reason to initially believe that the leaflet's reference to a Nelson Stud Welding company referred to the Nelson Lorain plant because foremen had voiced to him (reported) that that was one of the concerns, the employees were saying that these rates are rates that employees are receiving in Lorain, Ohio. Much more persuasive on this record is the reasonableness of such a conclusion on Bragg's part in the light of clearly ambiguous terms of the leaflet. Thus although Employer did not support Bragg with corroborative testimony of any of the foremen, I find Bragg's

testimony as to his own understanding at that time to that extent appears plausibly supported, and I credit it.[32]

No less plausible is (then) Organizer Davis' testimony that at the time he made up up the leaflet that he didn't know about the Lorain, Ohio contract; reasonably explaining that the Lorain plant was located in another county, and in another District's jurisdiction. Moreover, Vale testified compatibly, and thus in corroboration of Davis, that he (although taking part in employees' discussions on the leaflet in the days following its distribution earlier that week), knew nothing about a Nelson Lorain, Ohio plant application.[33] Under these circumstances, I find the

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32. However, I do not find it has been established in this record by Employer that *any* employees had actually told foremen that the leaflet portrayed rates were rates in effect at Lorain, Ohio. Employer, by election or otherwise has not established that fact by direct evidence. To the contrary; the record is clear that the only offered evidence of record that the Employer would seek to rely on in support of the latter additionally urged conclusion, was itself evidence received at hearing for a specified limited purpose of explaining the subsequent course of conduct of Employer (including the nature of Objection 8 as filed), and Bragg's subsequent conduct thereon in particular; and explicitly not received for the former purpose.

33. It is uncontradicted of record that Davis asked for no contract by name, and that the I.A.M. Research Department sent him only one contract for use. Davis also testified that Moss never told him about a Nelson plant in Lorain County, and the record reveals that Moss no longer held his position having completed 25-30 years of service. No inquiry appears of record as to availability of Moss to testify. Under all of these circumstances I decline to draw adverse inference from the failure of the Union to additionally corroborate Davis with testimony of Moss. Davis testified that he did know at the time that TRW, Inc. (parent company) was headquartered in Cleveland. In that connection I do not overlook his somewhat strained testimony that in hastily reviewing the Nelson Stud contract he misread the signatory company (TRW-Nelson Division) as a signature. However, as I understand the Board's test in such matters, it would not make any difference whether Davis had made *that* connection (nor if made to a Lorain County plant connection). Intentional conduct of a party is not a necessary element of misrepresentation. Finally to extent Employer argues campaign trickery is thereby evidenced, I find the weight of the evidence offered unpersuasive and unconvincing.

failure of the Union to present a still further testimonial support (of Moss) is insufficient reason in itself to discredit Davis (corroborated as he is by Vale); just as under all the circumstances I view the failure of Employer to support Bragg on distribution with corroborative testimony of a foreman is no reason to discredit Bragg's account of a pursued and aborted inquiry on the leaflet on April 21, in view of the supportive content of the Employer's Objection 8. Moreover, in both above regards, I do not overlook the significant circumstance that Bragg as well as Davis were involved principals; but were testifying as to recalled subdetails of events held much after the major events' occurrence.

Davis would also have his recollection that the leaflet was passed out on April 19, deemed supported by a certain personally dated document received in evidence over Employer's objection. Davis thus testified that when he learned that the Employer had filed its objections herein that talked about one of the handbills coming out on the day of the election, that he had put the date Thursday, April 21st on a certain copy of the leaflet that he last gave out and which he retained in his folder. According to Davis he made a similar entry on a copy of the Nelson Stud disputed leaflet (also contained in his folder) at the same time, showing distribution Tuesday, April 19th. (As Employer's Ojections were filed on April 28, even according to Davis, the stated entries would have been thus made at the earliest a week or more after the fact; and clearly after issue was joined on the date.

The procedural-evidence questions

The above-referenced dated document was the first sheet of a copy of the disputed leaflet. It was received over Respondent's procedural objection essentially that

since the document was encompassed within its lawfully served subpoena's terms but had not been produced along with the Union's production of other certain documents thereunder, that the document should not have been received at all.

Respondent had objected to the receipt of the document (bearing Davis' handwritten) notation "tuesday April 19th" solely on the basis that it was not earlier produced at time of the Union's production of other documents pursuant to subpoena process. On that occasion, witness Davis on the stand responded in explanation and related that of the original four pages of the leaflet, later multicopied for distribution, that he only had the 2-4 pages, which he produced in response to the subpoena; and that he told Employer at time of production that the original cover letter was missing and that he didn't know where it was. Davis testified original documents was what he understood Respondent had wanted and that is what the Union produced; and that he then identified a copy of the cover letter which Employer already had as a copy of the missing original cover sheet. Davis otherwise explained his failure to produce the questioned document with further explication that it was only a copy of the leaflet that he had retained in his personal file folder, on which he had placed the date as he testified.

Respondent argues that the referenced document was clearly encompassed within the scope of its subpoena, should have been produced, and that by virtue of the Union's initial failure to produce the document, it should not have been received thereafter. The Union has responded alternatively (at hearing) that it looked through the file for documents that Employer wanted that morning and responded by producing all the original documents that it had. Union Counsel urged that there was no preju-

dice to Employer; and argued that Respondent was not entitled to the production of documents until Respondent called Davis and asked for specific production. In brief Counsel has further clarified that the initial failure to produce the document was inadvertent.

The document was received, but with then stated reservation that evaluation on the question of the degree of probative weight to be attached to this document would await the ultimate record showing.[34] Employer renews its argument that no weight should be attached to the document; and in further support Employer has raised additional argument in brief that another union leaflet offered on the first day of hearing by the Union bore no such inscription, thus urging additionally that Davis' late presentment of the dated documents and testimony thereon has been thereby additionally rendered suspect. However the record does not reveal there was union claim that all copies of such documents were similarly dated, or it established of record that the document offered was described as being of such origin by Davis. Finally it is my view Employer has laid an insufficient predicate to warrant a conclusion by the Board of some sinister legerdemain, or other legal chicanery by Davis (or Union) evidenced from the circumstantial condition of the original Nelson Stud Welding Company agreement. On the material point, this agreement was candidly admitted by Davis to have been received by him from the I.A.M. Research Department. Employer would have also noted that

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34. Similarly the Union correctly observes in Reply Brief, and I find, contrary to urging of Employer, that there was no assertion by Union (as shown of record) to the effect that it did not have copies of the Nelson Stud leaflet which required Employer to supply its own cover sheet of that leaflet as evidence thereof. For all that appears of record Employer's supplying of copy substitution for original cover sheet was elective upon Davis' testimony that the original was not available.

the same agreement, as presently in evidence, bears appearance of having had added (by person(s) unestablished) in pen and ink inscription after typed name of Nelson Stud Welding Company the words "subsidiary of TRW, Inc."; it also bears evidence of later deletion of the latter inscription by an obvious and unconcealed whitening process. The material issue is not the condition of the document; and I thus need not resolve the propriety of such a deletion of even an errant mark on an original document once under subpoena process. This is particularly my view in the surrounding herein, where Davis has unequivocally identified the document he received, and categorically denied that he personally had either initially made, or deleted the above inscription; there is record showing that the document was not always in Davis' (or the Union's) possession; the original contract when ultimately produced to Employer *continued* to bear the very clear corporate signatory identification of "Nelson Division-TRW"; and in any event where the leaflet except (of same) *as distributed to employees* contained *no* such inscription; and there was no direct evidence of any employees' actual understanding of such otherwise.

It was, and upon further review of this record, remains my view that the above-described facts and circumstances (including the Union's prior substantial response to subpoena), are not such as to warrant imposition of the ultimate sanction of an initial outright rejection of nonproduced evidence when later offered. Thus the attendant circumstances were deemed not such as to warrant finding that the Union, and Davis in particular, in making response to the subpoena was clearly being evasive, nor acting deliberately in failing to provide a complete answer, on engaging otherwise willfully in a diversionary tactic with intent to obstruct the proceeding. Rather not

only was the production of all original documents in its possession made promptly by the Union in response to the subpoena request for production, (but copy of the missing original cover sheet, was, upon elective presentment and substitution by the Employer, as promptly identified by Davis as being copy of same. Moreover and significantly so, explanation was immediately made by Davis while on the stand which I found plausible, *viz.* that his understanding (or attention), and thus response was directed to a production of original documents as to which he testified he made full response. In like situations (e.g. in regard to Federal Rules 37 and 45) such a later evidence offer by a party has not been met with the ultimate sanction of an ordered evidence rejection, even under more vexatious circumstances.[35] The document's nonadmissibility having not been established on grounds of a fatally defective subpoena response (the only objection raised), the evidence offered still must be analyzed as to its probative value on the material issue. On that score I conclude and find, seemingly anticlimactically, that even if considered as a business entry, being in original of time post-party joinder of material issue, it appears much more clearly to be of self-serving nature, and thus entitled to little if any weight, beyond potential application to defend against Employer accusation that testimony of Davis as to his base claim of distribution on April 19th was one of recent fabrication.[36] Employer concedes it does not, and has never claimed the latter.

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35. E.g., see the discussion in regard to Fed. R. Civ. P., Rule 37(b) and (d), *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 994-996 (8th Cir. 1975); *Corporacion Pervana de Vapores*, 506 F.2d 927, 932 (5th Cir. 1975). See also generally, *Societe Internationale Pour Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 206-8 (1958).

36. See and compare *United States v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976), *cert. den.* 429 U.S. 1045 (1977).

The Union has argued that the testimony of Davis with regard to the April 19 distribution date is actually supported by *two* such prior consistent statements of Davis. It has been observed that Davis at hearing testified that upon learning of Van Dorn's objections (filed on April 28), Davis had reviewed his files and wrote in the dates of April 21 on the (last) leaflet that the Union distributed on that day (the day before the election), and April 19 on a copy of the (Nelson Stud) leaflet as being the date on which the disputed leaflet was distributed. The Union has now further urged in post-hearing motion that the hearing be reopened for the purpose of receipt of a certain affidavit given by Davis on May 19, 1977, assertedly (and likely) during the investigation of the Employer's Objections conducted by the Regional Office.

At hearing after Davis had testified that he might have given an affidavit in the representation case, it was reported by present Counsel for the Regional Office that upon several reviews of the representation file, it did not contain an affidavit from Davis. The Union now seeks to introduce the above affidavit of Davis as one in fact given in the representation case, and does so solely to establish that Davis gave a sworn statement to the Board on May 19, 1977 stating that he had distributed the disputed leaflet on April 19, 1977. (The initial charge in the "CA" case herein was not filed until much later on January 25, 1978.)[37] Union counsel relates that in preparation of brief

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37. At hearing the court made inquiry of Counsel for the Regional Office as to the evidentiary basis for the April 19 date appearing in the Regional Director's Report. The record reveals otherwise that the copy of the disputed union leaflet, previously supplied to the Regional Office by the Union, was returned to the Union without provision made (copy retained), or with description recorded of a dated leaflet return. It was thus impossible to independently ascertain whether the copy of same earlier sup-

(Continued on following page)

in reviewing numerous files counsel came upon the above described affidavit. Upon subsequent contact and inquiry of Regional Office counsel, and the latter's search of the related "CA" case file Union Counsel related being further advised the said search had revealed such affidavit had been inadvertently placed in that file.[38] Union Counsel argues that Employer Counsel has sought to impeach Davis' credibility on this issue; and the affidavit is relevant as part of the Regional Office's investigation in the "RC" case. Union Counsel urges in that regard that the affidavit is part of the Board's records of the investigation, and, therefore, this is not a case of a party seeking to introduce extrinsic evidence which it had an obligation to introduce at a hearing. The Regional Office does not oppose the Union's motion; but Employer does strenuously.

Employer contends that the affidavit does not qualify as either newly-discovered evidence, nor evidence which has become available to the Union only since close of hearing. The Employer also argues that the affidavit is not such evidence as the Board should otherwise conclude should have been taken (received) at the hearing. In that connection to the extent Employer would rely on

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Footnote continued—

plied by the Union to the Regional Office (and returned) was the one Davis described as bearing his dated inscription. Inquiry was also made by this trier of fact otherwise whether the file contained affidavits of any witnesses as to union leaflet distribution being on April 19. It was reported there was none, and accordingly there was no occasion for the trier of fact to call any additional witness who had earlier given testimony but who were not to be called by the parties.

38. Indeed on initial hearing date of the complaint allegations herein the affidavit dated May 19, 1977 of Davis was earlier produced for inspection by Employer (pursuant to Section 102.118 of the Board Rules and Regulations Series 8, as amended), following Davis' initial testimony herein. Union's Counsel was not counsel of Record in that proceeding.

Rule 803(3), Federal Rules of Evidence, I am wholly persuaded that the affidavit as a statement of memory or belief is excludable as hearsay where the witness *has* independently testified from recollection of material incidents as Davis had done here. Employer's further contention that the affidavit is not receivable under Rule 802(d)(1)(B) since Employer concedes that it has never contended that Davis has recently fabricated the April 19 date as date of distribution (as opposed to attack on leaflet evidence of same) presents a closer question in regard to improper influence, or motive in the light of Employer's attack upon the legitimacy of the first consistent statement. The argument that the affidavit should be received because it was part of the Regional Office's file and is part of the Board's records of the investigation is not itself deemed evidentiary reason to receive the document at this time unless it is shown admissible otherwise under the Rules of Evidence and the Board's procedural rules and regulations applicable to this proceeding.[39] If the dated copy of the leaflet cover sheet is correctly viewed as essentially self-serving, the affidavit of May 19 would appear to add no more in evidentiary support and would indeed appear to be merely cumulative. In my view, and controllingly so, the Union simply does not make adequate showing why the offer of such evidence could not have been made earlier at hearing. Accordingly, I decline to open the record for such purpose, and have, as noted earlier denied the Union's post-hearing motion, *N.L.R.B. v. Polytech, Inc.*,

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39. The issue is not the degree of evidentiary support the Regional Office May [sic] have possessed in making findings as to the union contentions, but what probative value the same has as evidence bearing on the issue of date of distribution of the disputed leaflet in this proceeding, and/or whether it presently should be received and considered. Whatever might have been its admissibility by virtue of Board direction for evidence receipt *at* hearing, in my view, present offer comes untimely.

469 F.2d 1226, 1229 (8th Cir. 1972); and *N.L.R.B. v. Victor Otlans Roofing Co.*, 445 F.2d 299 (9th Cir. 1971).[40]

d. *Other evidence offered by Employer; Employer's comparison of classifications.*

Testifying on basis of job descriptions contained in the Nelson Stud Welding (California) contract and his own evaluation of contended analogous employee classifications and Wage Groups of employees employed by Employer, Bragg has testified that Employer had no analogous classification in 10 of the 14 classifications listed;[41] and correlatively, did have in only 4 of the 14 listed.[42] Employer has calculated that the average rate of the jobs included in the Union's leaflet was $9.02. (The formula

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40. In so concluding, I do *not* rely on Employer's additional arguments that the affidavit in Union Counsel's files should be excluded because not initially produced pursuant to subpoena, for reasons earlier explicated as to the dated leaflet cover sheet. Nor is there any intendment or suggestion in renewed ruling affirming receipt of the latter dated cover sheet: that a party may with impunity selectively produce only certain documents that are described with reasonable particularity by subpoena. What has been found is that there was substantial response; and any deficiency in response herein, has been found to have been inadvertent, and not clear instance of recalcitrance, unacceptable gamemanship [sic] by witness/counsel and/or subpoena process abuse.

41. According to Bragg's contention, Employer had no employees in Tool and die maker [sic], Tool and Die Machinists, Senior Electronic Technician, Electronic Technician, Maintenance Machinist, Maintenance Welder, Automatic Screw Machinist, Journeyman Painter, Die Setter and Machine Adjuster, and Shop Janitor.

42. Thus Employer would place its 18 Wage Group I Machinists as Journeyman Machinist; had 4 Journeyman Welders; would place its 28 Wage Group II Machinists as Specialists; and had two Tool Crib Attendants. Additionally Bragg relates of the omitted Helpers Employer would place its 31-32 Specialists as Maintenance Machinist Helper; had 4 in Specialist Painter; would place 92 of its Machine Shop labor grade III and IV and Assembly A as Production Specialist; and would place its 20 Assembler B as Production Worker #2 and its 51 Assembler C as Production Worker #1.

followed was to simply add up classifications and divide by the number to give average hourly rate.) Employer has also calculated the weighted average wage rate for its contended includable 219 employees as being $7.41 for day and $7.61 for 2nd shift.

The Union has objected to the latter urging the same was but speculation on the part of the Employer; and the union otherwise established the calculations and comparison made did not take into account the relevant "C.O.L.A." On this (sole) matter, Counsel for the Regional Office also objected on the basis that whether Employer actually had employees in the classifications stated by the Union was irrelevant, that what was in issue was whether the content of the Union's letter contained substantial misrepresentations. The record reveals generally that Employer employs employees performing a wide variety of functions, including machining, maintenance, assembly, inspection, stock room, shipping and receiving and related functions.[43]

Party Contentions, analysis and findings

Preliminarily Employer correctly notes that the ultimate burden of proof to support unfair labor practice complaint allegations herein rest with the General Counsel. However to the extent that Employer would thereunder extend thesis that the unfair labor practice burden effectively has obviated Employer's own underlying burden

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43. Employer shows its specific classifications to be, in *Machine Shop*: Wage Group I-IV, Deburring, Material Handler and Utility; in *Assembly*: Assembler "A", "B" and "C" (Mechanical; Electrical), Welder, Painter, Carpenter, Material Handler, Assembly Helper and Utility; in *Shipping/Receiving Stockroom*: Stock Clerk "A" and "B", Shipping/Receiving Clerk, and Material Handler; in *Quality Control*: Inspection; in *Maintenance*: Maintenance Mechanic and Maintenance Electrician.

to support its objection to the results of the election upon which present hearing has been held, I reject same. It is too long and well established that the party objecting to the conduct of an election or conduct affecting the results of an election has the burden of proof to establish the validity of its objections to the election, *N.L.R.B. v. Mattison Machine Works,* 365 U.S. 123, 124 (1961); *N.L.R.B. v. OK Van Storage, Inc.,* 297 F.2d 74, 75 (5th Cir. 1961).

The relevant standard for review of objectionable election misrepresentations as initially expressed and explicated in *Hollywood Ceramics Co.,* 140 NLRB 221, 224 (1962) is as follows:

> *We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.* However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could

> only have had a *de minimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements. (standard italicized; and footnotes omitted)

In returning to the *Hollywood Ceramics supra* standard of review for alleged election misrepresentations in *General Knit of California, Inc.*, 239 NLRB 619, 620 the Board majority affirmed that the *Hollywood Ceramics* rule was also meant to embody the

> . . . firm belief that the employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply. (footnote omitted)

Relying on circumstances: (1) the cover letter (page 1) of the Union's leaflet had expressed criticism of Employer's (HPM) leaflet for not having revealed the geographic area of the I.A.M. represented company that was compared by Employer (with assertion employees reading the leaflet would not assume the Union would do the same); (2) the Union leaflet's failure to reveal the District Lodge involved; (3) the use of a company for comparison that had a similar plant in the Cleveland area; and (4) in the light of the emphasis placed on "one *of our* I.A.M. & A.W. contracts," the Employer firstly has contended that the leaflet has misrepresented in that it gives an incorrect impression to employees that it is based

on a local (Cleveland area) contract. This argument I find unpersuasive.

The record revealed that both parties had theretofore used I.A.M. general references in their campaign electioneering, rather than presentment of only District Lodge 54 agreements and arguments for evaluation by employees. The leaflet does not expressly assert it was a local District 54 contract. It identified the agreement only generally as one of our I.A.M. & A.W. contracts (which it is). On this record facts are not otherwise sufficiently established that would warrant conclusion that employees would be reasonably lead to conclude it was being presented only as something more *viz,* a local area contract. In short, with the leaflet content fairly viewed, there was at best an ambiguity present in the statement in the Union leaflet, but no warrant in the words used in the circumstances of the campaign conducted thus far for the sole restrictive inference necessary to support Employer's impression argument. To the contrary it more readily appears the Union was responding at best, in like fashion as Employer, with an I.A.M. & A.W. contract example more favorable to its election position than the unidentified I.A.M. contract (HPM) notably also unrepresented by District Lodge 54 and earlier selected by Employer.

Next, urging there has been effective copy concealment of the actual composition of the leaflet by Davis, the Employer has argued that the Union's leaflet resultingly appeared to employees to contain the entire block of rates and jobs in the contract, not a collection of rates and jobs actually selected and compiled by Davis. The short answer to the selected argument readily surfaces that it ignores clear import of the leaflet notice contemporaneously given to employees that the wage rates were but "some" (and thus by reasonable implication were both not all, and thus

union selected) rates from an I.A.M. contract that were being offered for their consideration.[44] There is some merit to Employer's contention in regard to compilation. I find the Van Dorn employees would not have been able to discern, from the form of the rate structure presented in the leaflet, that the rates presented were a compilation. However the Union has relatedly observed that the Board has had previous occasion to state the view in regard to a party use of a leaflet that spoke of "some" rates: "However it is our view that employees construe allegations of selected wage rates which are not characterized as average or minimal, as meaning top rates, consistent with human nature and the whole spirit of our competitive society."[45] Union's top rate argument is considered *infra*.

The Employer has also claimed union misrepresentation in assertion that the Union's leaflet contained job classifications and rates that were not in effect at the California Plant of Nelson Stud Welding Company in 1977. However more precisely I have found the facts to be that the job classifications *were* essentially embodied in the aforesaid contract. What is shown is that the aforesaid Nelson Stud (California) Plant is a small machine shop which during material times actually employed only four employees in but four classifications, only two of which classifications were utilized in the leaflet presentment. (Discussion as to Employer's objections as to the rates utilized is found *infra*.) The Union has counter-established

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44. Employer also argues that there was additional misrepresentation in that the leaflet contained job classifications and rates not included in any bargaining unit represented by the I.A.M. On this contention, as I have earlier found, the Employer has misconstrued and thus misrelied on interpretations of Moran's testimony which I have concluded are simply unwarranted on the credible evidence presented of record.

45. *Jeffrey Mfg.*, 184 NLRB 895 (1970), *enf. sub nom. Jeffrey Mfg. v. N.L.R.B.*, 440 F.2d. 410 (4th Cir. 1971).

effectively not only that the classifications it utilized *are* all contained in the pertinent contract but that although there are only four Nelson Stud employees covered thereunder, the contract itself was in fact essentially in form, its standard area agreement, i.e., one with terms the same as were applicable to many other companies, with bargaining units of various sizes, covering all such classified employees. Consequently, it is my view that the distortion that does arise in the use of the Nelson Stud Independent Agreement does not appear to involve campaign deceit of employees e.g. by effecting a consideration by employees that the I.A.M. & A.W. has had such a contract applicable to such classifications when as a practical matter because of the size of the identified Nelson Stud bargaining unit to which it applied, in substance and effect it really didn't. To the contrary, it is established clearly that the I.A.M. & A.W. labor unions had bargained same for significant numbers of employers, employing significant numbers of employees in significantly divergent bargaining units. In my view in that regard the variance to which we are here attentive is the type of distortion, inaccuracy or half-truth that arises in heated campaigns that the Board, though it would not condone, would also not police, or regard as having had an effect upon the election, and thus would not view as constituting grounds for objections to the election.

In regard to Employer's further contention that the Union's leaflet preparation involved an intentional selection of the Nelson Stud Welding Company Independent Agreement (of the many M.I.A. and I.A. agreements available), because of a Lorain County plant consideration, it was Employer's burden to present evidence sufficient at least to convince there was reasonably such an inferable effect upon employees. However the record evidence presented herein, in my view, simply does not warrant such conclusion.

The request Davis extended to the I.A.M. Research Department is shown of record to have been only to send him a contract with sufficient machinist classifications and good or decent rates so he could counteract Employer's earlier unidentified but lower rate presentment in the (Mt. Gilead, Ohio) leaflet; and the Nelson Stud Agreement is what Davis has testified he received back in response to that request. The Nelson Stud contract does contain a number of such classifications with rates appreciably higher which Davis used. Moran testified that usually such an Independent Agreement (as Nelson Stud) is executed by an Employer who would normally employ larger numbers of employees, though, as evidenced herein, it has been shown unusually not to be so in the case of the Nelson Stud Agreement. No showing was made of those in the I.A.M. Research Department relative to the contract selection process that led to the forwarding of the Nelson Stud Agreement to Davis as having other intended (local) purpose. Nor are there facts established otherwise of record deemed sufficient to warrant conclusion employees would be likely to have thus concluded, independently, because of union leaflet, or content. There were at least 31,029 Employer units in Cuyahoga County, alone.

The leaflet as handed out by the Union to employees contained no reference to "TRW-Nelson Division," or "Nelson Division of TRW, Inc.," or in any other manner made reference to a Nelson Lorain plant; and Davis, corroborated by Vale as to discussion about the leaflet, had heard no reference to a Nelson Lorain plant before the filing of Objections. Employer has introduced no *direct* evidence to the contrary; and as to Employer's desire for inference to be drawn of such effect from Bragg's described reports received from foremen, I decline to do so, in the face of the Union's unrebutted direct evidence offered to the con-

trary. From all that directly appears from this record, even accepting the recollection of Bragg fully, first inference at best is that some foremen have so described their concerns to Bragg. But foremen concerns may have actually been based on their own independent knowledge and concerns equally as well as on what they may have observed employees were doing, or saying at the time. Such a double inference I am unwilling to draw.

Clearly Employer was not misled as to the limited purpose for which the Bragg-foreman report evidence was being received; and Employer did not thereafter contravene direct testimony of Vale that a Lorain County plant was not mentioned in preelection employee discussions on the leaflet that he was aware of. Employer's burden was to establish that there has been a material misrepresentation made to employees, which includes the nature of the misrepresentation. Accordingly, Employer's urging that there has been substantial misrepresentation by the Union's singular use of the Nelson Stud Independent Agreement, (a) in that there were only four employees actually covered by said contract, in the light of all the other circumstances attendant to it being a standard agreement, and (b) that employees were misled by the Union's leaflet into believing comparison was being made with the Lorain, Ohio contract of Nelson Division of T.R.W., Inc.,[46] I conclude and find therefore to be without merit.

In that connection I would only further observe and concur in additional union observation that it was under no obligation to include in its leaflet all the classifications that were contained in the Nelson Stud contract; nor all

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46. For that reason I further conclude and find it unnecessary to make further analysis addressment of comparisons urged by Employer as to the said Lorain, Ohio agreement vis-a-vis the Union's leaflet.

the wage rates and provisions therein for that matter. What it was required to do under the Board's election standard was not to substantially misrepresent either classifications or wage rates in what it did present. Before passing on to considerations in regard to the wage rates presented, I also have found myself in agreement with (R. D.) Counsel insofar as alleged misrepresentation as to classification goes, *viz.*, that whether an Employer actually utilized certain classifications presented by a union to employees for comparison is not the material consideration in regard to whether the classifications and rates presented as contractual are themselves substantially being misrepresented. However, it is also my view that if contract misrepresentations be otherwise established as having been made by the Union in some manner in what it has presented to the employees, then evidence as to the nature of the jobs of employees employed by Employer, for comparison thereon such as has been offered by the Employer may have relevancy to the consequent issue of reasonable tendency to have had significant impact on the election.[47]

The critical issue has thus remained what it was presaged to be in earlier proceeding, *viz.*, whether the Union's Nelson Stud leaflet has substantially misrepresented certain Nelson Stud contract rates; and if so, whether the misrepresentations in the rates, even if substantial, are, under all attendant circumstances, to be objectively viewed as reasonably tending to have had a significant impact on the election. Pertinent to the latter are such circumstances as: when the Nelson Stud leaflet was distributed, whether on April 19 or 21; whether the material wage rates pre-

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47. If there has been suggestion of a different view heretofore, cf. *Modine Manufacturing Co*, 203 NLRB 527, 531 (1973), there was Board direction for inclusive receipt of all evidence herein, and with ultimate Board review, no harm is done.

sented by the Union would have reasonably appeared to the employees to be within the special knowledge of the Union such that employees would be likely to presume accuracy in the Union's presentment; whether the Employer itself had knowledge thereof and opportunity to respond; and/or whether it otherwise would appear that employees were, in any event, to be deemed capable, on their own, of evaluating the material. The latter may be shown by some demonstrated showing of independent knowledge or exposure to the material on the part of the employees, or from the degree of an obvious party overstatement as being in nature such that it may be reasonably concluded therefrom that employees would not have relied on it, or otherwise. All such issues are to be evaluated in foredrop of the Board's long held general view that once an underlying union representation matter has been resolved by the employees in a secret ballot election conducted under the Board's election process, the result evidenced thereby should not be one lightly set aside; and with further observation that neither of the parties campaigning and seeking the employees' designation of election favor, was entitled to the last word on that issue before the employees have made that choice.

Preliminarily it is found, as is observed often to be the case in such matters, that wage comparisons and arguments thereon were viewed by the parties in the conduct of their election campaign, as the key issue for presentment to the Van Dorn employees to effect their ultimate persuasion.[48] It is established that the wage rates last presented by the Union in its Nelson Stud leaflet were not wage rates simply excerpted or extracted by the Union from

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48. Cf. *Coca-Cola Bottling Company of Louisville*, 150 NLRB 397, 400 (1964).

the Nelson Stud contract itself. Rather, they were rates chosen by Davis for the employee comparisons to be urged; and they were wage rates also arrived at by a required calculation of Davis, though it is found that at the time such calculations were made, the rates arrived at were made in accordance with the actual terms and provisions of the Nelson Stud contract. It is also established that in that process, Davis elected to portray Nelson Stud's *second shift* rates together with an applicable contractual C.O.L.A. increment.

Davis constructed the Nelson Stud leaflet which presented these compiled wage rates for 14 selected classifications on which the Union would base its final wage argument to influence Van Dorn employees to vote for the Union. Contrary to Employer's urging, I have concluded and found that employees were reasonably put on notice therein that only *some* Nelson Stud contract classifications and wage rates were being offered to them by the Union for their comparison. However, it also seems as not open to a serious question on this record that Van Dorn employees would have also reasonably viewed the Union's Nelson Stud leaflet as the Union's offered response to the Employer's March 23rd (HPM) leaflet by virtue of its reference thereto. In the HPM leaflet the Employer clearly had compared Employer's claimed $6.69 *average hourly rate* with the asserted I.A.M. (HPM) negotiated *average hourly rate* of $5.50, along with Employer's additional assertion that it paid the highest wages in the industry. The shift premium rates were separately identified as being 22¢ for second shift, and 25¢ for third shift (and the same was compared with HPM's 12¢ and 15¢ respectively); and employees were told that cost-of-living adjustments were also made monthly at Van Dorn (and the same was com-

pared with no cost-of-living adjustments provided at HPM).

I find that Davis made the Union's Nelson Stud presentment to counter the above claims, based on the Nelson Stud contract, but did so without providing to the Van Dorn employees any express notice that what was being presented to them for their comparison and consideration at this juncture, were compiled rates from that contract for the certain classifications shown which were based on *second shift* (premium) *rates* with the Nelson Stud C.O.L.A. increment added. Apart from the issue of the propriety of C.O.L.A. inclusion, the rates presented obviously understated the highest hourly rates available under the contract (e.g., 3rd shift premium, but relating to fewest Van Dorn employees). I have found that the Union's Nelson Stud leaflet actually presented second shift rates with an 83¢ C.O.L.A. increment, which was accurate at the time compiled, although at the time of employee election commitment, on April 22, applicable C.O.L.A. increment (by virtue of an intervening and triggering price index) added 9¢ effective back to April 1. Thus available C.O.L.A. *was* then actually 92¢. Resultingly, as of election day, the Union's Nelson Stud leaflet was intended, but did not state, either expressly, or (then) accurately second shift rates with the full applicable C.O.L.A. increment, but was 9¢ short of same, in each of the fourteen classifications selected and portrayed. With C.O.L.A. included, the leaflet *overstated* first shift rates by 8¢ to 17¢ in all 14 classifications presented.

The Employer has argued the Union's misstatement should be viewed as being more broadly inclusive of the C.O.L.A. increment as well, as the C.O.L.A. also was not specifically identified by the Union as included in the rate

presented, thus arguing there was involved an overstatement by the Union of as much as $1.08 in the portrayed rates.

The Union argues any misstatement should be more limitedly construed since employees were unquestionably paid the C.O.L.A.; and it would further have the substantially [sic] of the shift (premium) rate misrepresentation itself evaluated in terms of it being but a low percentage (e.g. the proportion of 8¢ to 17¢) to the overall applicable rate. Thus the Union contends under that view there was but "an overstatement of between 1.6% and less than 1.2% of the overall rate." I find myself not persuaded by either of these arguments of Employer and Union. The former Employer position does not take into sufficient account Board evaluation of whether the party has essentially portrayed an accurate summary of rates, or employees would have understood "top" rates (discussed, *infra*); and the latter union position would appear to risk emasculating any real significance of the wage comparison differences usually presented by the parties, and in which aspect, it seems to me, employees must be realistically viewed to make their choice.

The Union would rely heavily in support of its contention that it did not misrepresent wage rates at all, on the contemporaneous notice given to Van Dorn employees that it was offering only *some* of the Nelson Stud contract rates for employee comparison; and the Union has argued in that respect that *Hollywood Ceramics, supra* has never heretofore been interpreted as requiring a union to set forth first shift rates, and to ignore the higher rates paid on other shifts. It also urges that consideration should be given by the Board to the additional circumstances which (I have found) were present in the case, *viz.*, that the Nel-

son Stud 2nd (and 3rd) shift premium rates were not uniform, and were built into the contractual rate structure itself. However, I find the latter argument also not persuasive.[49]

I thus conclude and find that there are two wage element considerations that are principally operative in what is urged by the Employer was the departure from the truth in the Union's Nelson Stud leaflet. They are: (a) the Union's *undisclosed* election to use the Nelson Stud contract's second shift rates in its wage rate presentment for the 14 classifications selected from that contract, rather than their applicable first shift rate base; and (b) the *undisclosed* inclusion additionally of the accumulated contractual C.O.L.A. increment in a single wage rate presentment.

Essentially the Employer contends that without disclosure by the Union that the rates it presented were second shift rates with C.O.L.A., Van Dorn employees would have construed the presented rates as day shift rates with-

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49. The argument therein seemingly is one based on advanced reasonableness in the Union's approach, e.g., when Davis elected to portray the 2nd shift rates as a kind of a medium range for comparison with all three shift employees of Employer. The Union has in that context noted that while the rates presented in the leaflet were 8¢ to 17¢ above contractual first shift rates, they were also 9¢ below the (intended) second shift rates, and 18¢-22¢ *below* third shift rates. It seems to me that both parties, the Union in this argument, and Employer in other arguments advanced as to intentional union misconduct, have missed the mark for ultimate attentiveness, which is, not whether the Union herein has in some manner acted deliberately to misrepresent, or in a manner which, from some vantage point of the facts, may be viewed as having acted reasonably. Rather the ultimately determinative question is whether the Union's leaflet has resulted in a misstatement being made to Van Dorn employees as to a material fact; and whether such material departure from the truth, whether intended by the Union or not, is one in character to be concluded as tending to have had a significant impact on the election results.

out C.O.L.A.; and thus contends that the Union has therein misstated the Nelson Stud contract's (first shift) rates for the classifications by as much as $1.08.[50] Employer thus contends the Nelson Stud leaflet's misstatement of these wage rates has constituted a substantial misrepresentation of Nelson Stud wage rates which unquestionably would have had significant impact on the election results.

Essentially the union first contends that the instant matter is one to be deemed governed by general principles of the Board's *Hollywood Ceramics*, holding that an election will not be set aside because a message to employees was ". . . inartistically or vaguely worded and subject to different interpretations."

Contrary to the Employer, the Union contends that under existing Board precedent that it was not fatal to the validity of the election results reached herein that it failed to disclose to the Van Dorn employees its inclusion of the contract's C.O.L.A. increments. Assuming that in the above circumstances under certain Board precedent,[51] that an undisclosed but otherwise accurate inclusion of C.O.L.A. increments would not, considered alone, be grounds to set aside the instant election, if is found that as a result of the undisclosed combining of these two wage elements, what then resulted from the undisclosed use of second shift rates and would have otherwise appeared as a contractual 17¢-26¢ (1st-2nd) shift variance

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50. Employer arrives at $1.08 by adding 83¢ C.O.L.A. to its apparent calculation of maximum second shift differential of 25¢.

51. Cf. *Shaffer Bayport—Division of Shaffer Tool Works*, 170 NLRB 1506, 1507 (1968), a case in which an election was not set aside though a total wage amount was claimed which actually was constituted by a wages and fringe benefits total. See also *Russell Newman Manufacturing Co. Inc.*, 158 NLRB 1260 (1966).

in the 14 classifications portrayed, has, as a practical matter, been reduced to an 8¢-17¢ variance by the interim effect of the accrual of the additional 9¢ C.O.L.A. increment which had not been factored by Davis in the leaflet's wage presentment.

Contrary to the Union's urgings, I am not persuaded that an above across-the-board 8¢-17¢ overstatement of first shift rates in all 14 classifications viewed alone, might not be considered a substantial departure from the truth.[52] The further question is presented whether there is real difference in applicable principle governing inappropriateness in a party, *with special knowledge,* listing a single (maximum) rate for a classification that actually paid a maximum-minimum wage rate range, and an undisclosed presentment of a second shift rate for a classification by a party also with special knowledge and in circumstances where employees have neither *independent knowledge* to evaluate it, nor there been [sic] Employer opportunity to respond to provide such to employees, cf. *The Calidyne Company*, 117 NLRB 1026, 1028 (1957). Or, does a use of "some rates" affect the results as well.

Although the Union's Nelson Stud leaflet clearly advised the Van Dorn employees that only *some* rates were being presented, it also, *inter alia,* must be viewed as imparting a union response to the earlier Employer leaflet that spoke of an *average hourly rate* Employer - I.A.M. (HPM) comparison. In the latter respect the Union has also argued that it did not make an express representa-

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52. *Hollywood Ceramics, supra; Walgreen Co.*, 140 NLRB 1141, 1143 (1963); and see also *The Cleveland Trencher*, 130 NLRB 600, 603 (1961). See and compare *Wiley Manufacturing Company*, 174 NLRB 158 (1969). The 8¢ to 17¢ actual variance as determined herein may be contrasted with earlier reported 11¢ to 30¢ variance in the same rates.

tion either as to what the median, or the mean wage rates were for the classifications under the Nelson Stud contract, nor as to the same that the Van Dorn employees would have earned had they been covered by the Nelson Stud contract. But these contentions, even if assumed as technically correct, do not fully, or fairly meet, the reasonable message imparted to the Van Dorn employees, *viz.*, that the Union's Nelson Stud leaflet *was* the Union's response to the Employer's claims raised in its March 23 (HPM) leaflet in regard to Employer paying the highest rates in the industry with explicit comparison of Employer - I.A.M. average hourly rates of $6.69 vs. $5.50, respectively. It also would readily appear that in such context, the Union's use of the above 14 selected classifications, all *higher paying* but for one (lowest) shop janitor, could reasonably be viewed by the Van Dorn employees as Union's counterclaim in different form not only as to whether Employer paid the highest rates, but as well, as responsive to Employer's claim of paying a higher *average hourly rate.* It is observed that the shop janitor classification, which would have reasonably been understood by Van Dorn employees to portray a lower (if not lowest) paid classification, was depicted at $6.91; thus, itself, higher than even Employer's claimed average hourly rate of $6.69. Nor is this observation an unfounded one. Davis has candidly acknowledged that his reason for portraying second shift rates to begin with was to portray a "kind of medium range" of the rates applicable for all three shifts. However, even assuming Van Dorn employees would assume inclusions, e.g. C.O.L.A., I readily conclude and find on this record, that Van Dorn employees would have no way of knowing that such a medium range or rates, e.g. between first and third shift rates, were also being portrayed by the Union for these stated classifications

under the Nelson Stud contract in the absence of some indication by the Union of use of second shift rates for that purpose. It would appear the "some rates" holding of *Jeffrey Mfg., supra,* would not be applicable, as a simple top rates presentment would not readily be inferable (without confusion) because of reasonable circumscription by its relation to the (HPM) average hourly rate. In summary, and in essence, if it is to be fairly observed that the Union did not state an actual average hourly rate claim directly, it would also appear as clearly revealed that the Union presented material in form and description from which Van Dorn employees could reasonably have understood Union's Nelson Stud leaflet was no less its answer to Employer's claim of paying the highest rates and paying a higher *average hourly rate,* and the stated rates and classifications construable by them in that light. However in my view they would not have reasonable [sic] construed the presented rates as also being either third or second shift rates. On the facts now fully revealed *The Calidyne Company,* holding, *supra,* would appear to have application *on the point* of undisclosed use of second shift rates, resulting in misstatement as to a reasonably otherwise inferable selective use of first shift rates to counter prior Employer-I.A.M. (HPM) assertions.

Moreover, the difficulty with Union's presently urged broad reliance on the *Jeffrey* case holdings[53] would appear to be threefold: (a) seeming lack of clear precedent for an application of *Hollywood Ceramics* principles to such an undisclosed use of second shift rates where the Employer operates three shifts (e.g., the question presented by the Board's pre-*Hollywood Ceramics* holding in *The*

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53. *The Jeffrey Manufacturing Company,* 180 NLRB 701, 702 (1970); and see *Jeffrey Manufacturing Company,* 184 NLRB 895 (1970); *enf. sub nom. Jeffrey Mfg. v. N.L.R.B.,* 440 F.2d 410 (1971).

Calidyne Company, supra).; the indicated circumscription of a full inference by employees of *the* top rate (3rd shift) presentment by virtue of the leaflet's reasonable relation to an average hourly rate interdiction; and finally the concurrent lack of many of the significant circumstances of the *Jeffrey* case itself, which were supportive of that result.

The Union has sought to rely on the broadest interpretation of the *Jeffrey* case holdings to the effect that since employees will generally infer top rates when a party bills only "some" selective rates, and since the stated Nelson Stud rates were less than available third shift rates, and C.O.L.A. was includable, there has been no misrepresentation. It seems to me however that equally key to the *Jeffrey* case holdings were the supportive circumstances that had reasonably led those employees to call upon their *own* ability to evaluate the questioned election material on their own. There were thus, in my view, significantly distinguishing features in the underlying facts of those cases which are critically not present herein.

Thus in the original *Jeffrey Manufacturing,* case id. 702, the Board had also observed: "Employees are presumed to take note of whether or not the party making the statement possesses intimate knowledge of the facts." It also noted the compared plant was *identified*; and it belonged to the *same* Employer; and employees otherwise had some independent basis on a related account for evaluating the Union's leaflet even without full information. *None of these factors* appear present herein. Thus a significant circumstance also present in *Jeffrey Mfg., supra*, was that the campaigning union there had told employees that it *learned* of the contract from which it drew its election material. The contract was actually negotiated

by a totally different union. As to the resulting imprecisely stated contractual rates, with (undisclosed) contractual incentive factors later calculated thereon, the erroneous rates for the classifications presented were then shown to have been actually erroneously *understated*. There, by virtue of the campaigning union having notified employees in the leaflet that it had *learned* of the contract, the Union did not reasonably present appearance to employees of having "intimate knowledge of the facts." It would appear the campaigning union in that circumstance was not held to as precise knowledge and recount of all the wage terms (or components) of that contract. Be that as it may, notably, its representation *was* held within the standard of essential overall accuracy in what it had presented to influence the employees. The Board in those circumstances concluded that a normal reliance of employees on such a top rates presentment was clearly not abused by actually understated rates, under *Hollywood Ceramics*, standard, *supra*.

In the instant matter, in contrast, the Union billed the base contract as being ". . . some rates and language from one *of our* I.A.M. & A.W. contracts. . ." I conclude and find the Union's Nelson Stud leaflet could reasonably be construed by Van Dorn employees as pertaining to a contract of the I.A.M. & A.W. as to which the Union would have special knowledge; and it would appear reasonably to follow therefrom that the Van Dorn employees would have been likely to rely on it for stated accuracy. Here the rates were *overstated*.

In view of all the above circumstances, including the shift makeup of the Van Dorn electorate (heretofore noted as being 176 on 1st shift, 86 on 2nd shift, and but 35 on 3rd shift) it is my view that it cannot confidently be said that the Van Dorn employees would have readily

construed the presented Nelson Stud rates as being top rates in the sense of being composed of third shift rates with C.O.L.A. added. They clearly were not aware that (erroneous) second shift rates with C.O.L.A. were presented. It would rather appear as just as likely, indeed more likely, that they would have construed first shift (basic hourly) rates with C.O.L.A. were presented. At the least seemingly, there would reasonably have been engendered confusion on the part of some Van Dorn employees by the Union's undisclosed use of second shift rates.[54] *Jeffrey* not being applicable, upon further reflection on all these circumstances, I am now convinced that there appears to be inconsequential difference between a wrongfully conveyed impression that employees receive a single rate (when they actually receive a maximum-minimum rate) and wrongfully conveyed impressions as to shift rate paid, cf. *The Calidyne Company, supra.* I digress to a consideration of Employer's opportunity to respond thereto.

The parties are in dispute as to when the Nelson Stud leaflet was distributed by the Union. The record ultimately reveals Employer's witness Bragg is evidenced as having been alone in recalling and testifying that the Nelson Stud leaflet was distributed in the afternoon of April 21. In contrast Davis (with substantial corroboration by em-

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54. See and compare the case of *Grede Foundris, Inc.*, 153 NLRB 984 (1965) specifically distinguished in the latter. There highest rate concept did not save representations of average take home pay [sic], weekly earnings and hourly rates of several companies represented by the *same* union which were overstated, or were shown applicable to but a few employees; and they were deemed to be material misrepresentation in that employees *could* reasonably construe them by virtue of the presentment as being representative. Here it would at least seem to appear that the Van Dorn employees *could* also reasonably have construed the Nelson Stud rates as being day shift (basic hourly) rates by virtue of the (undisclosed) presentment made.

ployees Vale and Davis Reichbaum) categorically has denied distribution on April 21 or 22, and testified that the leaflet was distributed on April 19. Vale testified that he did not distribute the Nelson Stud leaflet and was unsure of its specific date of distribution. Vale has recalled it being distributed (only) *earlier* in that week, though also specifically recalling that there had been time for employee discussions about it in the shop for a couple of days before the election. Apart from testifying the Nelson Stud leaflet wasn't passed out on April 21, Reichbaum had only general recollection of passing out such a leaflet (though such election activity would have necessarily occurred at least earlier than April 21.)

I find Employer's evidence offering in support of a distribution on April 21 is simply not convincing. There is initially observed to be what must be regarded as a significant variance between Bragg's hearing recalled date of April 21 and earlier claim by Employer of a distribution on day of election (April 22) as initially expressed in Employer's formal recitement of Objection 8, and particularly as continued thereafter formally in later Employer Exceptions (filed to Regional Director's Report thereon). Though inquiry was made, no explanation was advanced by Bragg, or Employer, for this variance. Moreover, Bragg's own testimony as to an April 21st distribution of the Nelson Stud leaflet was itself much weakened when on cross-examination he revealed certain limitations in his own personal knowledge of the distribution. Davis' testimony was convincingly corroborated by others who in contrast testified with supportive and mutually corroborative detail for [sic] their own recollections. Thus employees Vale and Reichbaum have mutually testified in express detail that the Nelson Stud leaflet had not been distributed

on the day, time and place by Davis (or by them) as Bragg alone had recalled and that there was only a union leaflet distributed in response to an Employer leaflet distributed that very day. Indeed despite such broad attack upon Bragg's recollection, including Reichbaum's specific (uncontradicted) testimony that on this occasion when Employer's personnel manager Gallagher had also approached Reichbaum who was distributing the Union's response, the latter had given Gallagher a copy of the only leaflet they were then distributing which Reichbaum claimed was not the Nelson Stud leaflet, no attempt was made by Employer to contravene such evidence; and thus no attempt to corroborate Bragg in the light of it. Gallagher did not testify thereon; and neither Gallagher, nor Employer's plant manager gave testimony otherwise in support of Bragg's other recollections of a meeting and discussion of the leaflet with them that day as an event that followed an earlier report and production of the leaflet to Bragg by some foremen, thus recalled by Bragg alone as after distribution that day. Thus, even were I to have concluded and found, as earlier noted was urged by Employer, that the Union's additional documentary exhibit bearing date of Tuesday, April 19 as offered (in support of Davis) and received in evidence, was to be wholly rejected by virtue of its non-immediate production pursuant to Employer's subpoena (which for reasons stated *supra*, I do not), I would still find the weight of Employer's evidentiary showing on a claimed April 21st distribution unpersuasive in meeting its burden.

Rather I am persuaded by the weight of the credible evidence offered by the Union (and I find) that the Nelson Stud leaflet was in fact not distributed on April 21 or 22. I also have no reservation in crediting Davis'

account to the extent of concluding that the Nelson Stud leaflet had been prepared by Davis by Tuesday, April 19. However I have had some continuing reservation as to its actual distribution on that same day in the light of Bragg's uncontradicted testimony another union leaflet was handed out on April 18 or 19, and in the light of Davis' own admission his plan was to make sure the Nelson Stud leaflet would be the last leaflet the Union would hand out in the campaign (though as it would turn out, it would not be); and in view of the failure of either Vale or Reichbaum to corroborate a distribution on that specific day (April 19) and plausibility for its distribution the next day (e.g. the day on which Employer scheduled and held its captive audience speech and later mailed copy thereof to employees). However as the weight of the credible evidence has wholly convinced me that the Nelson Stud leaflet was not distributed on April 21 as Bragg alone recalled, and, as Vale's testimony in regard to discussion of the leaflet is seen to be somewhat supportive of Davis' specific recollection of a distribution on April 19, and inasmuch as certain of Bragg's testimony was itself suggestive of there being more than one union item coming in in the early part of that week, I thus further conclude that it appears to be more probable than not from this record that the Union's Nelson Stud leaflet was first distributed in the afternoon of April 19; and I so find. However, although I do not find Bragg's recollection of a date of distribution of April 21 as being supported by weight of evidence considerations, I am not persuaded thereby also that there is sufficient warrant on this record to additionally conclude as is urged by the Union in its brief that Bragg (and/or others) had no discussions and had made no inquiry attempts as to Nelson Stud Welding Company, prior to the election. Bragg has testified that

Employer did do so, unsuccessfully; and Union has offered no direct evidence from asserted participants that is in conflict therewith or that has otherwise convinced me to the contrary. In any event, given the circumstances of this leaflet, particularly in not revealing the distant area of a different employer's machine shop involved, nor reasonably revealing identity of the signatory union, I am persuaded and I find that even with distribution of said leaflet now determined to be accomplished on April 19, Employer did not have ample time prior to the election to effectively respond.[55] Consequently employees did not have benefit of any such response for their own evaluation of the leaflet.

There is no question that the above Nelson Stud leaflet had the effect of interjecting *new* material (that contract's wages for comparison) on the issue theretofore before employees. The wage information presented therein to Van Dorn employees would be reasonably viewed by employees as being peculiarly or specially within the knowledge of the Union since the contract was claimed by the Union and neither the signatory union, nor the area of the named employer's plant was revealed. I am wholly convinced and I find that Van Dorn employees had no access to that contract; and they are not shown otherwise to have had any knowledgeable basis for an independent evaluation of this material as it was presented in the leaflet. Since this was *new* matter that was presented by the Union to them as being material to the issue of their representation by the Union, such cases as *Information Magnetics Corp.*, 227 NLRB 1493, 1393 (1977) [sic] and *Wells Fargo Security Guard Services*, 194 NLRB 828,

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55. *Western Health Facilities*, 208 NLRB 56 (1974); *Zarn, Inc.*, 170 NLRB 1135 (1968).

829 (1972), relied upon by the Union are also deemed readily distinguishable.[56]

The Union has also argued from the other substantial campaign background, and in certain aspects persuasively so factually, that there were in this campaign earlier instances of certain inaccuracies presented by Employer to its employees under similar leaflet form circumstances, i.e., leaflets that did not disclose and/or omitted material matters and which had made union identification of an employer and area, and union response equally difficult. Indeed the latter was particularly demonstrated to be so as to the very (HPM) leaflet to which the Union was lately responding in its Nelson Stud leaflet. I have no doubt on this record that in distributing the Nelson Stud leaflet, the Union was not only intending to answer the Employer's undisclosed (HPM) leaflet, but to do so in like kind. Such a tit-for-tat consideration however, can be no justification to ignore the Board's most recent reemphasis of its firm belief that the *Hollywood Ceramics* rule afforded a degree of protection from late distortion of the issues in this manner:

> . . . by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply.[57]

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56. Thus unlike the situations presented in *Information Magnetics, supra* and *Wells Fargo, supra,* the Van Dorn employees had not been earlier exposed to party cross-propaganda on this (new) material, and the same being on its face neither extreme nor extravagant, employees cannot reasonably be viewed as to have been independently able to evaluate it. Nor would the facts as now found appear to call for reconsideration of earlier concluded inappositeness of the holding of *Essex Wire Corporation,* 188 NLRB 397, fn. 3 (1971) *mod.* on *other grounds* 496 F.2d 862 (6th Cir. 1972) for similar reasons heretofore considered in footnote 20 of my earlier decision in this matter.

57. *General Knit of California, Inc.,* 239 NLRB 619, 620 (1978).

Accordingly I find in summary: that the Union's Nelson Stud leaflet was distributed to Van Dorn employees on April 19, 1977; that the Nelson Stud leaflet has misstated second shift rates; that the rates were not presented as second shift rates, but rather as presented were more reasonably construable by Van Dorn employees as being day shift rates; that said day shift rates as a result of an understatement of permissible[58] inclusion of applicable C.O.L.A. were overstated in all the 14 selected classifications in amounts ranging from 8¢ to 17¢; that the aforesaid misstatement in wage rates in both amount and scope may be substantial; that the misstated rates were compiled by Clarence Davis (then), an Organizer of District 54 from a contract negotiated by another union covering a different employer's distant plant in an undisclosed area, but presented in form and with union claim that would have led Van Dorn employees to conclude the Union herein had special knowledge thereof; that Van Dorn employees did not have reasonable access to that contract, nor otherwise possess independent knowledge of its terms; and that Employer herein did not have an adequate opportunity to respond to the rates to the extent they were erroneously quoted in the Union's Nelson Stud leaflet.[59]

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58. I also have found inclusion of C.O.L.A. under circumstances here presented was not a substantial misrepresentation; cf. *Shaffer Bayport, Div. of Shaffer Tool Works,* 170 NLRB 1506, 1507 (1968); and *Russell Newman Manufacturing Co., Inc.,* 158 NLRB 1260 (1966). I also find that Union was responding to Employer's HPM leaflet which had compared Employer average hourly rate which reflected monthly accumulated cost-of-living increases.

59. *Hollywood Ceramics, supra; General Knit of California, Inc., supra;* and see also *The Cleveland Trencher Company,* 130 NLRB 600, 603 (1961); and *The Calidyne Company, supra.*

The dispositive issue of significant impact

The only major issue remaining for addressment and the issue ultimately deemed dispositive of the matter, is the question of whether (or not) in the above total circumstances of this case the aforesaid misrepresentation is to be concluded as so substantial as to reasonably have had a significant impact on the results of this election which the Union won 151 to 131. The test is not one of showing of an actual impact upon Van Dorn employees but whether the above misrepresentation had ". . . a tendency materially to mislead."[60]

The Union has alternatively contended that this election should not be set aside even assuming the above wage rate misrepresentation be regarded as a substantial one. The Union argues that the 8¢-17¢ misstatement in these otherwise high rates would not be likely to have had a real impact upon the election in the total circumstances of the case. The Union would appear to rely principally on the Board's holdings in *National Waterlift Company, a division of Pneumo Dymanics Corporation,* 175 NLRB 849 (1979), and on *Cross Baking Company,* 186 NLRB 199, 200 (1970).[61] In *Cross Baking, supra,* the Union then involved had claimed contractual increases obtained as being 75¢ per hour (or $30 a week) in wages and benefits.

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60. *Miller's Pre-Pared Potato Company, Inc.,* 240 NLRB 1302, 1303 (1979); *Modine Manufacturing Company,* 203 NLRB 527, 531 (1973).

61. The Union has also stated a reliance on *Wagner Electric Corporation,* 227 NLRB 1748 (1977). However I conclude the latter case is clearly inapposite on its facts. Thus *Wagner Electric, supra,* the Union involved had *accurately* presented the stated amounts of yearly cost-of-living increases due under the terms of a contract between the Union and an *identified* employer. Sole misstatement was as to certain effective dates, error being of from less than 1 month to 5 months and the latter concluded unlikely to effect [sic] election results.

The Union's claim on review of the facts was later deemed shown to be essentially accurate in that contractual increases were shown to include specifically 49.5¢ in wage increase and up to 12.5¢ for health, welfare and pension, both the wage increases and these benefits totalling alone 62¢ (and as much as $24.80 per week), and with still other benefits increased of clearly some additional but imprecise value of record. The Board thus concluded in *Cross Baking, supra,* that the Union leaflet's presentment, in terms of the large increases actually obtained, would have involved but an exaggeration, but not a "substantial departure from the truth . . . [which] may reasonably be expected to have a significant impact on the election." On the other hand distinguishable features present therein were that the Union's leaflet involved an identified and nearby plant. Be that as it may it is on the basis of *National Waterlift, supra,* that the Union would appear to advance its most engaging, indeed convincing argument.

Seemingly the central holding of the latter case is that where the thrust of a party's leaflet message, which has contained error, remains essentially true, or the same, even when the misrepresentation contained in it is subsequently discounted, the misrepresentation may be regarded, as not reasonably to be viewed as having had a significant impact upon the election. The underlying procedural facts in *National Waterlift* were, that a petitioning union filed objections to election results alleging that in a company publication received by employees the *day before the election,* the employer therein had made substantial misrepresentations as to the wage rates and other benefits at other companies. The employer's publication had compared its own wages and benefits with those of *seven* other companies which were identified in

the leaflet only as Company "A" through "G." Only 2 of the 7 companies, "A" and "B" were alleged to have had their wages misstated.[62] Although Company "A" and "B" were not identified in the leaflet, the employees of both were represented by the same union as was petitioner therein.

The underlying facts of the alleged misrepresentations therein were that as to Company "A," the Employer had failed to include a 7¢ "cost of living increase." The case is deemed significant in part because it did not go off explicitly or seemingly on the Union's knowledge or opportunity to respond to a leaflet put out by the Employer only a day before the election. Rather it was there found that even if the 7¢ increase had been reflected, the employer's compared existing rates for all classifications remained between 9¢ and 64¢ *higher* than those rates actually paid by Company "A." As to Company "B" the rates shown were those in effect under a preexisting contract, a more recent agreement having upgraded them as effective but 5 days before the election. The new contract negotiated by the same union was not timely available to the Employer, a distinguishing feature, as the new contract was not within the special knowledge of the Employer who thereafter put out the erroneous leaflet. However again, the case did not go off explicitly nor seemingly on such considerations of special knowledge, or lack of same, or opportunity to respond. After comparing Quoted Rate, New Contract Rate and Employer's Rate the Board observed the Employer's rates for four classifications were (still) higher; were 5¢ and 17¢ lower for 2 classifications, grinders and assemblers; and were

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62. An additional question was raised as to the present existence of a pension at another Company "D," deemed not material to present discussion.

39¢ lower for janitor rather than 17¢ as reflected in the leaflet, and similarly 28¢ lower rather than 6¢ lower for Stockkeeper. A three member panel of the Board in a 2-1 decision,[63] upheld election results and explicated the basis as being that the above wage misrepresentations were believed to be *not*:

> . . . so substantial as to be reasonably expected to have had a significant impact upon the election. The Employer's obvious message to its employees in comparing its rates and benefits with those of some seven other companies was to show that its benefits were similar or higher. The only claimed inaccuracies in this document concerned rates and benefits of the three companies noted. And, even given the Employer's misrepresentations, its rates and benefits were, in almost every instance of comparison with these three companies, actually similar or higher, and in some instances when lower, they were admittedly lower.

The Board therein also went on to recount its view under the *Hollywood Ceramics*, standard:

> As the Board has noted before in evaluating conduct of the type involved in this case, absolute precision of statement and complete honesty in campaign literature are not always obtainable in an election campaign nor are they expected by employees.

The significance of the *National Waterlift* decision vis-a-vis *money* variance (as opposed to rate difference) may be best observed from the following extrapolation of the base data of that case:

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63. Board Members Brown and Jenkins were in the majority with Board Member Zagoria dissenting.

Classification	Employer (Nat'l. Waterlift) Rate	Quoted "B" Rate	Employer/ Quoted "B" Difference	New Rate	Employer/ New Rate Difference	Variance or Change
Machine Repair	4.07	3.73	+.34	3.94	+.13	(-.21)
Machinist	3.97	3.71	+.26	3.94	+.03	(-.23)
Grinder	3.74	3.35	+.39	3.79	-.05	(-.44)
Toolmaker	4.07	3.73	+.34	3.94	+.13	(-.26)
Assembler	3.62	3.58	+.04	3.79	-.17	(-.21)
Layout Inspector or "A"	3.97	3.58	+.39	3.79	+.18	(-.21)
Stockkeeper	3.29	3.35	-.06	3.57	-.28	(-.22)
Janitor	2.88	3.05	-.17	3.27	-.39	(-.22)

If a variance or change of 21¢-44¢ in a wage span of $2.88-$4.07 may not be, because of given circumstances, so substantial as to be reasonably expected to have had a significant impact on the election where the leaflet message has remained essentially the same, it would appear to follow *a priori* an 8¢ to 17¢ variance, in similar circumstances is to be similarly viewed under the authority of *National Waterlift, supra.*

The key consideration, it would consequently appear is what was the message that the Nelson Stud leaflet reasonably imparted to Van Dorn employees; and with union misstatement in rates presented removed, did the initially imparted union message essentially remain true. If so, the Van Dorn employees were not materially mislead by the overstatement.

The Nelson Stud leaflet was distributed subsequent to Employer's March 23 (HPM) leaflet and Employer's April 4 "Maximum Wage Survey", though it specifically referred to the HPM leaflet. In the HPM leaflet Employer had claimed that it paid a higher *average hourly*

rate than did the I.A.M.-Employer (HPM) with comparison there stated as being $6.69-$5.50, respectively. Employer also claimed it paid the *highest wages* in the industry. In its "Maximum Wage Survey" Employer claimed that its average Straight Time Rate, there shown as $6.51 was higher than seven other generally named, but otherwise unidentified companies.[64]

The Union's response in the Nelson Stud leaflet was *not* with an explicit claim of having an Employer under contract paying higher *average hourly rate.* What the Union did do was present its selection of the 13 highest paid classifications from the Nelson Stud (standard) contract. It omitted helpers. It also presented the lowest rated classification, shop janitor, which reasonably would have been recognized by Van Dorn employees as being a lower if not the lowest paid classification. The Nelson Stud leaflet Shop Janitor was shown by the Union as being paid $6.91 when in point of fact under the Nelson Stud Contract day shift Shop Janitor would have then correctly been paid $6.83, notably higher than the average hourly rate of $6.69 (or $6.51 average straight time rate) claimed by Employer. Indeed the highest day shift rate paid by Employer for any classification was $7.05 as compared with the otherwise lowest (corrected) day shift rate listed in the Nelson Stud contract, *viz.*, $7.55 for Tool Crib attendant "A." It is convincingly apparent that the 8¢-17¢ variance in the Nelson Stud rates would

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64. Employer claimed such rate was higher than four unidentified greater Cleveland concerns (covering selective Machine Shop and Assembly Wage Rates) represented by the I.A.M. (as to two of which concerns Union has raised serious discrepancies as herein shown); and higher than two District Competitors not represented by the I.A.M. (one shown of record to be in Cleveland, and the other indicated to be located in Massachusetts). The seventh unidentified company (HPM) was there listed as a direct competitor.

have had no significant effect in the leaflet message as to any presented classification providing higher rates than Employer paid. Employer having introduced Machine Shops into the campaign it can hardly now be heard to complain of Union's response.

The Employer has cross-contended that there was additional misrepresentation by the Union in its selective process in that (a) only 14 classifications which the Union selected for presentment in its Nelson Stud leaflet had job descriptions which related to Van Dorn jobs which were filled by but 52 employees; (b) classifications omitted by the Union would have increased relation to jobs of 219 Van Dorn employees. The short answer to the above is of course that the Union was not obligated to present all the classifications and rates from the Nelson Stud contract, any more than Employer is to be regarded as having been so obligated in regard to Employer's selection of employers, classifications and rates which it presented in its earlier leaflets. If a classification listed by the Union was not applicable or in use at Van Dorn's operation, there is no one mislead [sic]; there is no misrepresentation in such presentment.

Finally, even assuming it is appropriate to additionally consider in regard to impact issue the effect of the above rate variances in those classifications which Employer has evidenced and argued were relateable [sic] to its operations, there is similarly observed to be no significant distortion of the message from the following comparisons:

Nelson Stud Day Shift		Employer	
Journeyman Machinist	$8.90	Machine Shop WG I	$7.05
Journeyman Welder	$8.90	Welder	$6.45
Specialist	$7.60	Machine Shop WG II	$6.85
Tool Crib Attendant "A"	$7.55	Tool Crib Attendant	$6.15

I thus conclude and find the Board's holding in *National Waterlift* would appear applicable and controlling of the issue. As previously noted in other context it is administrative law judge's duty and responsibility to follow prior precedent of the Board not overruled by the Board, or reversed by the Supreme Court, *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716, 718 fn. 12 (1977). I thus conclude and find that the Union's 8¢-17¢ misrepresentation in the rates paid to the 14 selected and portrayed classifications in its Nelson Stud leaflet as heretofore found were not so substantial as to be reasonably expected to have had a significant impact upon this election. Accordingly I further conclude and find that Employer's Objection 8 is without merit.[65] It follows that the Union's prior certification by the Board was valid. Accordingly I shall issue the following Supplemental Conclusions of Law reflective of present finding on the issue remanded, and of prior findings made on that contingency

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65. As noted earlier, Van Dorn employees *were told* via the Union's IBEC leaflet, thus probably the very day before the distribution of the disputed Nelson Stud leaflet, in addition to union accusation that Employer had made ". . . many false and misleading statements to confuse the voters. . .," essentially that a party's campaign misrepresentations would no longer be a subject of Board intervention. Thus in a real sense, Van Dorn employees were forewarned (perhaps seemingly ironically) by the Union itself of the potential for unreviewable misrepresentation by a party. Question of reasonable inference would appear thus to also arise whether the circumstances of such a unique forewarning on party misrepresentation did not occasion employees exercise of their real free choice in this election, irrespective of either parties campaign conduct, theretofore or thereafter. However in the balance of the *General Knit* principle, recently emphasized by the Board that employees are to be afforded a *degree* of protection from such late election distortion, and with full realization that whatever standard the Board sets, it will likely generally find followed by the parties in these election proceedings, I have not relied thereon in preliminarily reaching the above conclusion. It is my view that the desirability of such a policy of engrafting any inroad exception to the Board's only recent reaffirmation of the above principle is a matter which would appear best left to the Board itself.

as summarized and found in footnote 43 of my prior decision.

Supplemental Conclusions of Law

1. The Union's Nelson Stud leaflet was distributed to Van Dorn employees on April 19, 1977. It was intended to, but misstated second shift rates. However, these rates were not disclosed as second shift rates, but rather, as presented and in context, were more reasonably construeable [sic] by Van Dorn employees as based on first or day shift rates, though with applicable cost-of-living adjustments included. As a result of 9¢ understatement of the accrued and applicable 92¢ contractual cost-of-living adjustments, said rates as day shift rates were overstated in all 14 union selected classifications in amounts ranging from 8¢ to 17¢. The misstated rates were compiled by Clarence Davis, (then an Organizer of District 54 from the Nelson Stud Welding Company Independent Agreement, which was itself applicable to but four employees, but which was in form a standard agreement applicable to significant numbers of employers employing variously sized bargaining units of such classified employees. However the Nelson Stud contract was negotiated by another union covering a different employer's distant plant in an undisclosed (California) area; and it was otherwise presented in form and with union claim that would have led Van Dorn employees to conclude the Union herein had special knowledge thereof. The Van Dorn employees did not have reasonable access to that contract, nor possess independent knowledge of its terms. Van Dorn did not have an adequate opportunity to respond to the rates to the extent they were erroneously quoted in the Nelson Stud leaflet. The aforesaid misstatement in wage rates in both amount and scope may be viewed as substantial,

but in the context of this election campaign and under applicable Board precedent would appear to be not so substantial as to be reasonably expected to have had a significant impact upon this election.

2. Employer's Objection No. 8 is herein determined to be without merit; and it follows that the Board's prior certification of the Union is valid.

3. Accordingly, it is now appropriate to substitute for prior Conclusions of Law numbers 5 and 6 the following:

5. (a) District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO was validly certified on January 17, 1978 pursuant to Section 9(a) of the Act as the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) By refusing, on and after February 22, 1978, to recognize, meet and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including refusing to meet and

bargain with the Union over the effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; and by refusing, commencing on or about March 7, 1978, to furnish the Union with certain requested data relating to wages, fringe benefits, job classifications hiring dates and home addresses of all employees of the Respondent in the above appropriate unit, the Respondent has violated Section 8(a)(5) and (1) of the Act.

(c) In the above circumstances establishing that Respondent Employer was under present legal obligation to bargain with the Union, as the validly certified exclusive collective-bargaining representative of its above employees, that certain letter of Respondent's president (dated May 4, 1978) addressed to Van Dorn employees to the effect that Respondent would not bargain with the Union until the federal courts have determined whether the election was a fair one, was violative of Section 8(a)(1) of the Act.

6. Except as heretofore concluded in paragraphs numbered 3 and 4 of prior Conclusions of Law, and as contingently summarized in footnote 43 of prior decision and now hereinabove set forth, Respondent has not otherwise engaged in conduct in violation of the Act as alleged in the complaint.

4. The following remedy and recommended order reflective of the above is appropriate and recommended.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[66]

ORDER

Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning the status of a strike vote and urging employees not to support a strike.

(b) Telling our employees that we will never recognize the Union and that it would be useless for employees to go out on strike.

(c) Telling our employees that we will not bargain with the Union until the federal courts have determined whether the election was a fair one.

(d) Refusing, in violation of Section 8(a)(5) and (1) of the Act, to recognize, meet and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including refusing to meet and bargain with the Union over the effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; and refusing to furnish the Union with certain data requested by the

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66. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Union for purposes of collective bargaining and relating to wages, fringe benefits, job classifications, hiring dates and home addresses of all employees of the Respondent in the above appropriate unit.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize, and upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the above unit of employees, including meet and bargain with the Union about the effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees, and if an understanding is reached, embody such understanding in a signed agreement; and upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates and home addresses of all employees of the Respondent in the above appropriate unit.

(b) Post at its plant in Strongsville, Ohio, copies of that attached notice marked "Appendix."[67] Copies of the notice on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for

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67. In the event that the Board's order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D. C. May 18, 1981

/s/ ROBERT G. ROMANO
Robert G. Romano
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to recognize, meet and bargain with DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, as the certified exclusive collective-bargaining representative of the employees in the unit described below:

> All employees and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL recognize, and upon request, meet and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including meet and bargain with the Union about the effects of our prior unilateral change in paid lunch policy for certain employees, and if an understanding is reached, embody such understanding in a signed agreement; and WE WILL, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and

home addresses of all employees of the Employer in the above appropriate unit.

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike; or tell our employees that we will not bargain with the Union until the federal courts have determined whether the election was a fair one.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

VAN DORN PLASTIC MACHINERY CO.
DIVISION OF VAN DORN COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone No. (216) 522-3126.

Office-Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS, CLERK

(3)

No. 84-647

In the Supreme Court of the United States

OCTOBER TERM, 1984

VAN DORN PLASTIC MACHINERY CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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14P

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably exercised its discretion in determining that misrepresentations in a union campaign flyer did not justify setting aside a representation election.

2. Whether the Board properly considered all of the facts in determining that an employer violated 29 U.S.C. 158(a)(1) by interrogating employees about strike votes.

3. Whether an employer's statement that it would continue its unlawful refusal to bargain until ordered to cease and desist by the federal courts was protected by 29 U.S.C. 158(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 736 F.2d 343. The National Labor Relations Board's decision and order (Pet. App. A18-A31) are reported at 265 N.L.R.B. 864.

JURISDICTION

The judgment of the court of appeals (Pet. App. A42-A47) was entered on July 23, 1984. The petition for a writ of certiorari was filed on October 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 22, 1977, petitioner's production and maintenance employees voted to be represented by District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) (Pet. App.

A2). Petitioner filed timely objections to the election, asserting, among other things, that on the day of the election the Union distributed a flyer containing what purported to be a copy of one of the Union's contracts with another firm, but which in fact was a forgery. Petitioner asserted that the flyer misled its employees into believing that the Union had obtained favorable wage rates and benefits for other employees. Pet. App. A33; Supp. App. S27.

On May 27, 1977, the Board's Regional Director issued a report recommending that petitioner's objections be overruled and the Union certified. In making this recommendation the Regional Director applied the standard announced by the Board in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), which provided that representation elections would be overturned on the basis of misleading campaign statements only if the statements involved the use of "forged documents which render[ed] the voters unable to recognize the propaganda for what it is." *Id.* at 1313 (footnote omitted). The Regional Director found that the flyer in this case was not a forgery because it is not an exact reproduction of a portion of a collective bargaining agreement but merely a collection of excerpts that have been juxtaposed for convenience (Pet. App. A33; Supp. App. S32).

On January 17, 1978, the Board adopted the Regional Director's findings and certified the Union as the exclusive bargaining representative of petitioner's production and maintenance employees (Pet. App. A39-A40). When petitioner refused to bargain or to supply relevant bargaining information requested by the Union (see Supp. App. S17-S18), the Board's General Counsel issued a complaint alleging that these refusals violated petitioner's obligation under Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) (29 U.S.C. 158(a)(5) and (1)) to bargain in good faith.

2. While this complaint was pending, the Union held two strike votes among bargaining unit employees (Pet. App. A15; Supp. App. S61-S62). Prior to the first vote one of petitioner's foremen told Thomas Vale, a member of the Union negotiating committee, that petitioner's president never would recognize the Union, and that a strike would be fruitless (Supp. App. S65-S66). Also before the first vote, petitioner's vice president, William Sheffield, asked Vale, in the presence of other employees, if the employees were going to strike. When Vale answered affirmatively, Sheffield stated that the employees did not need a union and that there was no point in striking. Sheffield made a similar inquiry before the second vote, and again stated that the employees should avoid a strike and "let the Union fight it out in court." Supp. App. S62-S63. Finally, before the second vote petitioner's president, Sam Smith, sent a letter to all employees stating that petitioner "would not bargain with the Union until the Federal Courts have determined whether the election was a fair one" (Pet. App. A59; Supp. App. S64-S65).

Following these developments, the Board's General Counsel issued another complaint, this one alleging that the comments by Sheffield and the foreman and the letter from Smith restrained and coerced petitioner's employees in violation of Section 8(a)(1) of the Act. These allegations were consolidated with the pending refusal-to-bargain complaint. Supp. App. S2-S3.

3. While both sets of complaints were pending before an administrative law judge, the Board overruled its *Shopping Kart* standard for assessing the impact of campaign misrepresentations, returning to the standard set out in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). See *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). Under the *Hollywood Ceramics* approach, substantial misrepresentations may provide grounds for setting aside an election.

Applying this standard to the facts as set out in the Regional Director's report, the judge decided that the Union campaign flyer was misleading. This finding, the ALJ concluded, required overturning the election, although he also found that petitioner's foreman and vice president had unlawfully interrogated, restrained and coerced employees through their conversations with Vale. Pet. App. A32-A37. On the General Counsel's appeal, however, the Board remanded the case to the ALJ for further factual findings.

On remand, the ALJ determined that the misstatements in the Union flyer were relatively minor and could not reasonably be thought to have had a significant impact on the election. The judge accordingly ruled that the election need not be overturned, that petitioner unlawfully had refused to bargain and to supply information, and that Smith's letter to petitioner's employees also was unlawful because petitioner "was under [a] present legal obligation to bargain with the Union." Supp. App. S161-S164.

While exceptions to the ALJ's supplemental decision were pending, the Board again changed its standard concerning misrepresentations made during representation campaigns, returning to the *Shopping Kart* standard. *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982). Applying this standard, the Board adopted the judge's finding that the Union's campaign flyer did not require overturning the election. Pet. App. A20. The Board also adopted the judge's findings, conclusions and order with respect to the other violations at issue in this petition (*id.* at A20-A21).

4. In relevant part, the Court of Appeals affirmed the Board's factual findings and enforced its order.[1] Citing

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[1]The court of appeals overturned a Board finding that petitioner had unlawfully implemented a new attendance control system; it remanded for further proceedings on the question whether petitioner had unlawfully implemented a new lunch period policy (Pet. App. A10-A14).

NLRB v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946), the court noted that the Board "enjoys a particularly broad discretion 'in establishing the procedure and safeguards necessary to [e]nsure the fair and free choice of bargaining representatives by employees' " (Pet. App. A7). The court therefore followed the lead of several other courts of appeals in holding that the Board had acted within its discretion in adopting the *Midland National Life* standard (Pet. App. A9), agreeing with the Board that elections should not be set aside "on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made" (*ibid.*).[2] On the facts of this case, the court of appeals endorsed the Board's conclusion that the Union flyer did not constitute a forgery (Pet. App. A6-A7). The court also found the Board's unlawful interrogation, restraint, and coercion findings to be supported by substantial evidence (*id.* at A14).[3]

ARGUMENT

1. Exercising its broad discretion to establish procedures to ensure free choice of bargaining representatives (see *A.J. Tower*, 329 U.S. at 330), the Board has determined that it "will no longer * * * set elections aside on the basis of misleading campaign statements" but "will [only] intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life*, 263 N.L.R.B. at 133 (footnote omitted). Every circuit that has passed on the issue has approved the Board's use of this standard. See, *e.g.*, *NLRB*

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[2]The court of appeals reserved judgment on the propriety of applying the *Midland National Life* rule to situations where "no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth * * *." Pet. App. A9.

[3]One judge dissented in part on this factual issue (Pet. App. A17).

v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983); *NLRB* v. *Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1363-1364 (4th Cir. 1983); *NLRB* v. *Rolligon Corp.*, 702 F.2d 589, 594-595 (5th Cir. 1983); *NLRB* v. *Milwaukee Brush Mfg. Co.*, 705 F.2d 257, 258 (7th Cir. 1983); *NLRB* v. *Monark Boat Co.*, 713 F.2d 355, 360-361 (8th Cir. 1983); *NLRB* v. *Yellow Transportation Co.*, 709 F.2d 1342, 1343 (9th Cir. 1983); *NLRB* v. *DPM of Kansas, Inc.*, No. 83-1542 (10th Cir. Sept. 24, 1984); *Certainteed Corp.* v. *NLRB*, 714 F.2d 1042, 1052-1060 (11th Cir. 1983).[4]

Petitioner contends (Pet. 16-20), however, that this Court should review the propriety of the Board's test because the Board has altered the applicable standard three times in seven years. There is no merit to this contention. The appropriate standards for the conduct of representation elections are matters committed to the Board's discretion. While the Board must apply its established rules uniformly, it is free to change those rules if it determines that doing so will further the policies of the Act. Cf. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975). The Board made just such a determination in *Midland National Life*.

2. Petitioner's additional contention (Pet. 10, 11-14) that the court of appeals erred in failing to assess the lawfulness of Sheffield's remarks to Vale under the standard enunciated by the Board in *Rossmore House*, 269 N.L.R.B. No. 198 (Apr. 25, 1984), or in failing to remand the issue to the

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[4]While the Sixth Circuit here and the First Circuit in *NLRB* v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1983) reserved judgment on whether the *Midland National Life* rule properly may be applied in particularly egregious cases of misrepresentation, petitioner does not contend that this case involves a misrepresentation of that magnitude. Indeed, the court of appeals had "no hesitation" in applying the rule to the facts here (Pet. App. A9).

Board for reconsideration in light of *Rossmore House,* is equally without merit. Petitioner asserts (Pet. 11) that the Board applied a per se rule to find that Sheffield's questions violated the Act. This was improper, petitioner continues, because use of a per se approach was rejected in *Rossmore House.*[5] In so contending, however, petitioner misapprehends the basis of the Board's ruling. The administrative law judge, whose decision in this regard was adopted by the Board, did not rely on a per se test in concluding that Sheffield's questions interfered with protected rights. Instead, the judge examined the circumstances surrounding the interrogations, noted that Sheffield's questions "were not isolated" incidents, and relied upon *Cagle's, Inc.,* 234 N.L.R.B. 1148, 1150 (1978) (where the Board found a similar interrogation improper "when viewed in the context of * * * other unlawful conduct") in finding that the interrogation amounted to a violation. Supp. App. S64. Reconsideration in light of *Rossmore House* therefore was unnecessary.[6]

3. Petitioner's final contention (Pet. 20-24) — that Smith's letter constituted speech protected under Section 8(c) of the Act (29 U.S.C. 158(c)) — was not addressed by the court of appeals and does not warrant review by this

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[5]In *Rossmore House,* the Board, overruling its decision in *PPG Industries, Inc.,* 251 N.L.R.B. 1146 (1980), rejected a "*per se* approach" to "evaluating whether interrogations [of open and active union supporters about their union sentiments] violate the Act * * * ." Rather, the Board announced that the appropriate test is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House,* slip op. 4.

[6]Contrary to petitioner's implication (Pet. 11), the Board did not rely on *PPG Industries* in finding Sheffield's interrogations unlawful. That case was decided five months after the ALJ issued his decision here, and it was not cited by the Board when it adopted the judge's findings (Pet. App. A20). The Board's decision to reverse *PPG Industries* in *Rossmore House* therefore does not require reconsideration of this case.

Court. As petitioner acknowledges (Pet. 21), *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969), established that statements by employers are protected under Section 8(c) only if they do not infringe the "equal rights of the employees to associate freely." Whether an employer's statement improperly interferes with the exercise of employee rights must be determined within the "context of its labor relations setting." 395 U.S. at 617.

Here, the Smith letter was sent to employees after the Board had overruled petitioner's election objections and had certified the Union — a time when, as the Board found, petitioner "was under present legal obligation to bargain with the Union" (Supp. App. S164). The letter followed statements by petitioner's foreman and vice president that Smith would not recognize the Union. And the letter was sent only three days before the second strike vote. In these circumstances, the Board could reasonably have found that Smith's letter tended to interfere with, restrain and coerce employees in the exercise of their right to select a bargaining representative and bargain collectively. Petitioner has offered no reason to doubt the Board's factual conclusion on this point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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